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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

FEDERAL EXPRESS CORPORATION,
Petitioner,

vs.

TENNESSEE PUBLIC SERVICE COMMISSION, KEITH BISSELL, FRANK COCHRAN, and STEVEN HEWLETT,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether abstention under *Younger v. Harris*, 401 U.S. 37 (1971), is appropriate where a facially conclusive claim of federal preemption over state regulation is presented.

2. Whether a state agency is estopped from asserting abstention under *Younger v. Harris*, 401 U.S. 37 (1971), where the state agency has failed to plead abstention, has urged the District Court to hold a hearing on the merits, has submitted a pretrial brief without mentioning abstention, has argued just prior to a full trial that the District Court should abstain under *Burford v. Sun Oil*, 319 U.S. 315 (1943), not *Younger*, and has stated prior to the trial's conclusion that abstention is no longer an issue.

3. Whether considerations of comity and federalism underlying *Younger* abstention are presented when a plaintiff voluntarily dismisses its appeal of a state administrative decision and attacks the administrative tribunal's actions in federal court as violative of federal statutory and constitutional law.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, Federal Express Corporation, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on February 14, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit entered on February 14, 1991 (reprinted in the Appendix at A-1) is reported at 925 F.2d 962 (6th Cir. 1991). This opinion held that abstention pursuant to *Younger v. Harris*, 401 U.S. 37 (1971)

was required and affirmed the District Court's dismissal of the case on abstention grounds. The District Court's opinion entered on April 23, 1990 (reprinted in the Appendix at A-16) is reported at 738 F. Supp. 1140 (M.D. Tenn. 1990).

The Court of Appeals' opinion entered on February 14, 1991, reflects the second time this case has been appealed. After a full trial on the merits, the District Court held in two opinions that it had no jurisdiction to entertain this case. (A-27), 693 F. Supp. 598 (M.D. Tenn. 1988). The Court of Appeals initially found that jurisdiction was lacking, (A-65) (unpublished opinion), 878 F.2d 381 (6th Cir. 1989) (Table); but later reversed itself finding jurisdiction, (A-69) (unpublished opinion), 909 F.2d 1483 (6th Cir. 1989) (Table).*

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on February 14, 1991. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(a).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 49, § 1305(a)(1). (Reproduced in pertinent part.)

> (1) Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates,

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*For the Court's convenience, the prior opinions in this case are contained in this document as the Appendix (A). Other pertinent documents are contained in the Supplemental Appendix (SA).

routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

United States Code, Title 49, § 1302(b). (Reproduced in pertinent part.)

(b) Factors for all-cargo air service

In addition to the declarations of policy set forth in subsection (a) of this section, the Board, in the exercise and performance of its powers and duties under this chapter with respect to all-cargo air service shall consider the following, among other things, as being in the public interest:

(1) The encouragement and development of an expedited all-cargo air service system, provided by private enterprise, responsive to (A) the present and future needs of shippers, (B) the commerce of the United States, and (C) the national defense.

(2) The encouragement and development of an integrated transportation system relying upon competitive market forces to determine the extent, variety, quality, and price of such services.

(3) The provision of services without unjust discriminations, undue preferences or advantages, unfair or deceptive practices, or predatory pricing.

Supremacy Clause of the United States Constitution, Article VI, Clause 2.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in

the Constitution or Laws of any State to the Contrary notwithstanding.

Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3 (reproduced in pertinent part).

The Congress shall have power . . .

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

THE PARTIES

Federal Express Corporation filed this lawsuit against the Tennessee Public Service Commission and its three Commissioners, Keith Bissell, Frank Cochran, and Steven Hewlett. (*See* Complaint: SA-1). All of the defendants were represented by the Tennessee Public Service Commission's general counsel and all opinions in this case refer only to the Tennessee Public Service Commission. Accordingly, all references in this petition for the respondents are to the Tennessee Public Service Commission. Pursuant to Rule 29, Supreme Court Rules, Federal Express Corporation has no parent or subsidiary corporations other than wholly-owned subsidiaries.

STATEMENT OF THE CASE

This case presents the Court with several conflicting decisions from the circuits in the application of *Younger v. Harris* abstention in the context of state administrative proceedings and preemptive federal regulations. The Court of Appeals for the Sixth Circuit has taken a hard line in its opinion (A-1, 925 F.2d 962 (6th Cir. 1991)), mandating *Younger* abstention in a case where federal preemption of state regulation is clear-cut, where a full trial in federal court has taken place, where the state has, prior to trial, taken such positions as would under general principles of equity, require a finding of waiver or estoppel, and where, because of the

dismissal of state proceedings, no issues of comity or federalism remain. In so doing, the Sixth Circuit, purporting to apply its own precedent in *CSXT, Inc. v. Pitz*, 883 F.2d 468 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 1480 (1990), has effectively "promulgated a hard and fast rule of abstention in all state administrative matters involving preemption."[1]

A. THE SUBSTANTIVE ISSUE — PREEMPTION OF STATE ECONOMIC REGULATION OF AN AIR CARRIER BY 49 U.S.C. § 1305

The substantive issue in this case is whether the Tennessee Public Service Commission may order Federal Express, a certificated air carrier, to file an application for a certificate of convenience and necessity as a motor carrier under the state motor carrier provisions contained in T.C.A. § 65-15-101, *et seq.*, thereby immediately initiating economic regulation of the Federal Express system. Federal Express contends that this regulation on its face "relates to [the] rates, routes, and services of an air carrier" which are exempted from all such state regulation by 49 U.S.C. § 1305, and the Supremacy and Commerce Clauses of the United States Constitution.

Federal Express employees sort over one million express delivery parcels each night during a critical three hour sort

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[1] In *CSXT, Inc. v. Pitz*, 883 F.2d 468, 475 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 1480 (1990), the case upon which the Sixth Circuit's opinion in this case was based, the court stated that it was not promulgating a "hard and fast rule of abstention in all state administrative matters involving preemption."

process at the company's Memphis, Tennessee airport superhub.[2] These packages come from every state and many foreign countries, and timely completion of the sort is essential to the express delivery of these parcels throughout the fifty states and the world the next morning. To facilitate the sort, the Federal Express system handles every package uniformly. Uniform rates, uniform billing, uniform shipping documentation, and uniform scheduling on the tight airline schedule are imposed on all parcels to ensure expeditious handling. (See District Court's Findings: A-28-30; 693 F. Supp. at 599-600.)

Simply because of the location in Memphis of Federal Express' superhub, a very small number of parcels in the system are transported solely on the ground in Tennessee. The District Court found that less than .01 percent of the company's nightly express packages are transported in Tennessee by truck only, most of which have both an origin and destination in rural west Tennessee near Memphis. These few parcels are transported in the same trucks to and from the sort with thousands of interstate and air transported parcels and are indistinguishable from them. (See District Court's Findings: A-28-30; 693 F. Supp. at 599-600.) Yet, the Tennessee Public Service Commission seeks to regulate the rates, routes, and services of these ground-only Tennessee parcels while admitting that 49 U.S.C. § 1305 prohibits its regulation of any parcels that are transported at some point

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[2] The volume at the time of trial in this case was approximately 700,000 packages per night, the overwhelming majority of which had an origin and destination far away from Tennessee. The volume figure is now in excess of 1,000,000 and includes significant international routes also.

by air.[3] Accordingly, the Commission has ordered Federal Express to file a certificate of convenience and necessity to initiate the regulation process.

The imposition of this economic regulation by the Public Service Commission upon the rates, routes, and services of the *de minimis* Tennessee ground-only parcels necessarily impacts

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[3] As part of its air carrier service, Federal Express operates a fleet of trucks, all of which connect with aircraft and operate on a national airline schedule. (Tr. (September 10, 1987); pp. 41-64 (Doyle Cloud)). (Excerpted at SA-79-97.) The Commission admits that it cannot under 49 U.S.C. § 1305 generally regulate those trucks, all of which carry an overwhelming majority of packages that are transported by air at some point.

According to the Commission, if a truck were to contain 1,000 parcels originating in Jackson, Tennessee, 999 of which are ultimately destined for New York by airplane through Federal Express' Memphis superhub, only one of which is destined for Memphis through the same hub, the Commission's officers have a right to stop the truck, to require different documentation, different rates, and to impose further restrictions upon weights and the recipients of the parcels.

Indeed, the proof showed that trucks carrying no intrastate packages transported only on the ground in Tennessee have been stopped by the Public Service Commission on two previous occasions threatening late deliveries to hundreds of Federal Express' interstate parcels. (Tr. (September 10, 1987); pp. 109-110) (Excerpted at SA-98.)) In addition, the proof showed that the intervenor Purolator Courier Corporation which was historically a trucking company, had applied for a certificate of convenience and necessity, had submitted to regulation for many years, and had been greatly restricted by the Commission as to what it might carry, to whom it might make deliveries, and at what rate each parcel was transported. Indeed, Purolator admitted during the course of the hearings that it was violating its tariff in Tennessee because it simply could not comply with it. (Excerpts from Public Service Commission Hearings (September 4, 1986), pp. 10-21 (Glasscock) (SA-103-110); pp. 62-68 (Labrada) (SA-111-117); Tariff of Purolator Courier Corporation (Ex. 3 to September 10, 1987 Hearing) (SA-118-123.))

the operation of the Federal Express uniform air carrier system, as well as the thousands of other express parcels which are transported at some point by air. Federal Express therefore contends in this lawsuit that the Commission's actions are in direct violation of 49 U.S.C. § 1305, which prohibits all state regulation relating to "rates, routes, and services of an air carrier," and of the Supremacy and Commerce Clauses of the United States Constitution.

B. THE PROCEEDINGS BELOW

Federal Express Corporation filed this case in the United States District Court for the Middle District of Tennessee on August 7, 1987, to enjoin an order of the Tennessee Public Service Commission subjecting this air carrier to regulation of its rates, routes, and services, as a "motor carrier" under T.C.A. § 65-15-106.[4] Jurisdiction was based upon 28 U.S.C. § 1331 and § 1337. (Complaint: SA-1; Commission's Order, SA-9.)

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[4] T.C.A. § 65-15-106 reads in pertinent part as follows:

> Powers of public service commission.—
>
> (a) The public service commission is vested with power and authority, and it shall be its duty to:
>
> (1) License, supervise and regulate every motor carrier in this state, and to fix or approve the rates, fares, charges, classifications and rules and regulations pertaining thereto;
>
> (2) Regulate and supervise the schedules, service and method of operation of such motor carriers;
>
> (3) Require the filing of annual and other reports and any other data;
>
> (4) Require that the accounts and records of such motor carriers be kept and maintained in a manner consistent with good accounting practice; and
>
> (5) Supervise and regulate motor carriers in all matters affecting the relationship between such motor carriers and the public.

(Footnote 4 continued next page)

Federal Express contended that the Commission's order was a violation of 49 U.S.C. § 1305 which prohibited any state regulation of an air carrier's rates, routes, or services, and of the Supremacy and Commerce Clauses of the United States Constitution. Federal Express requested declaratory relief and an injunction to prevent the Public Service Commission from beginning its economic regulation of the air carrier by requiring

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(Footnote 4 continued)

(b)(1) The commission shall designate enforcement officers charged with the duty of policing and enforcing the provisions of this part. . . .

. . .

(b)(3) Such enforcement officers upon reasonable belief that any motor vehicle is being operated in violation of any provisions of this part, shall be authorized to require the driver thereof to:

(A) Stop and exhibit the registration certificate issued for such vehicle;

(B) Submit to such enforcement officer for inspection any and all bills of lading, waybills, invoices or other evidences of the character of the lading being transported in such vehicle; and

(C) Permit such officer to inspect the contents of such vehicle for thepurpose of comparing same with bills of lading, waybills, invoices or other evidence of ownership or of transportation for compensation.

(b)(4) It shall be the further duty of such enforcement officers to impound any books, papers, bills of lading, waybills and invoices which would indicate the transportation service being performed is in violation of this part, subject to having the further orders of the court having jurisdiction over the alleged violation.

the company to file an application for certificate of convenience and necessity. (A-31-32, 693 F. Supp. at 601.)[5]

Prior to filing the action in District Court, Federal Express had filed an administrative appeal from the Public Service Commission in the Tennessee Court of Appeals. In order to protect its status as an integrated air carrier exempted from state regulation and operated pursuant to the encouragement and direction of Congress,[6] Federal Express asked the Public Service Commission and the Tennessee Court of Appeals to stay the order pending the appeal. The company asserted that its federally-protected integrated air carrier system would be irreparably harmed if it were required, during the pendency of the appeal, to file the application and submit itself to the state's regulatory agency that oversees and regulates the rates, routes, and services of motor carriers coming within its jurisdiction. (A-31-32, 693 F. Supp. at 601.)

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[5] To apply for a certificate of convenience and necessity, a motor carrier must provide, among other things, the following:

> (1) Full information concerning the ownership and financial condition of the applicant, and designation and description of the equipment proposed to be used;
>
> (2) The complete route or routes with designation of highways over which the applicant desires to operate, and the territory which the applicant desires to serve;
>
> (3) The proposed rates, schedule or schedules, or time cards of the applicant; and
>
> (4) In the case of the proposed contract haulers, a copy of the contract or contracts under which the applicant proposes to operate.

T.C.A. § 65-15-109(a)(1)(2)(3)(4).

[6] 49 U.S.C. § 1302(b).

The Public Service Commission did not act on the request for a stay. The Tennessee Court of Appeals refused to issue the stay, acknowledging but not resolving Federal Express' concern that submission to the jurisdiction of the Public Service Commission would impair its federal rights and moot its substantive appeal.[7] Because the Tennessee Motor Carrier Act provides no mechanism for filing such application under protest and because submission to the jurisdiction of the Tennessee Public Service Commission constitutes the beginning of Tennessee's economic regulation of Federal Express and the impairment of its federal rights, the company sought relief in District Court to prevent the immediate mooting of its appeal and the beginning of the piecemeal state regulation prohibited by Congress.

In District Court, an initial hearing on Federal Express' application for a temporary restraining order was held. The restraining order was granted. The court found that Federal Express had demonstrated the requisite likelihood of prevailing on the merits and that the company would be irreparably harmed if it were forced to submit to economic regulation before the substantial federal statutory and constitutional issues were heard. (Temporary Restraining Order: A-72-74.)[8] The case was set for a hearing on the preliminary injunction and both the Public

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[7] A court may not create a controversy where one no longer exists. Yet the Tennessee court wrote: "[S]uch application for stay be denied on condition that compliance with said order of the Public Service Commission will not prejudice the prosecution of the present proceeding for review of said order." (Court of Appeals Order (August 6, 1987): SA-34.))

[8] The District Court wrote: "Submission to the jurisdiction of the Public Service Commission by filing an application may render moot the plaintiff's constitutional and federal statutory claims, and unduly interfere with and harm the plaintiff's alleged integrated transportation system developed under federal authority." (A-73.)

Service Commission and an intervenor, Purolator Courier Corporation,[9] answered the complaint and filed trial briefs without mentioning abstention. (Answer: SA-42; Trial Brief: SA-50), and moved for a speedy and consolidated trial on the merits pursuant to Rule 65, Federal Rules of Civil Procedure. (Motion and Memorandum in Support: SA-35-40.) Upon agreement of the parties at a status conference during which the court raised the abstention issue, the hearing on the merits was set for September 10 and 11, 1987.

Before the trial of this cause in District Court, Federal Express moved to dismiss its state court appeal for review of the Commission's order. The company took this action because the trial was proceeding on the defendants' motion for a speedy trial and because, as the District Court had found, the absence of a stay, which the Tennessee Court of Appeals had refused to grant, threatened to impair its federal rights and to moot the federal statutory and constitutional issues. After the dismissal and prior to the trial's conclusion, the Public Service Commission through its attorney stated:

> Your Honor, the abstention issue is no longer an issue in this case. There is no longer a pending state court decision. There is no longer any reason for you to await the outcome of that decision.

(Tr. (September 10, 1987): p. 214; SA-100.)

After the hearing on the merits, on June 16, 1988, the District Court held that it had no subject matter jurisdiction over the

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[9] Purolator Courier Corporation moved to intervene in this lawsuit as a defendant pursuant to Rule 24, Federal Rules of Civil Procedure. The District Court granted Purolator's motion to intervene at the beginning of the hearing on the merits. Purolator Courier Corporation subsequently withdrew from the appeal of this case and has not participated at the appellate level.

issues in this case pursuant to *Public Service Commission v. Wycoff Co.*, 344 U.S. 237 (1952). (A-27) 693 F. Supp. 598 (M.D. Tenn. 1988). On or about June 21, 1988, both Federal Express and the Commission moved the court to reconsider, asserting that jurisdiction was present under this Court's opinion in *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983). After argument, the District Court refused to reconsider and filed a second lengthy opinion, holding again that *Wycoff* and its progeny demanded dismissal of this case. (A-43) 693 F. Supp. at 607 (M.D. Tenn. 1988). The District Court found that the status quo should be maintained pending the appeal of the jurisdictional issue and restored the injunction against the Public Service Commission pending Federal Express' appeal.

Upon appeal, a panel of the Sixth Circuit initially found jurisdiction absent and ordered dismissal of the case. (A-65) 878 F.2d 831 (6th Cir. 1989) (Table). Upon Federal Express' petition for reconsideration *en banc*, the panel reconsidered its ruling, found that jurisdiction existed, and remanded the case for further consideration. (A-69) 909 F.2d 1463 (6th Cir. 1989) (Table).

Upon reconsideration the District Court held a short hearing concerning abstention. On April 23, 1990, the District Court entered an opinion abstaining pursuant to *Younger v. Harris*, 401 U.S. 37 (1971) and dismissing the previous preliminary injunction. (A-16) 738 F. Supp. 1140 (M.D. Tenn. 1990).

On February 14, 1991, the Court of Appeals reached its decision affirming the District Court's decision to abstain. The Court of Appeals held (1) that even if federal preemption of the Tennessee Public Service Commission's efforts to regulate an air carrier's rates, routes, and services is abundantly clear, abstention was nevertheless required; (2) that the Public Service Commission did not waive the abstention argument even though it had urged a trial on the merits, had failed to raise abstention in its answer, had later argued *Burford* abstention rather than

Younger abstention, and had asserted before the trial's conclusion that abstention was no longer an issue; (3) that the date of filing rule is an inflexible one for determining whether *Younger* abstention is required even if, at the time of trial, there is no ongoing state proceeding; and (4) that there was an adequate opportunity in the state proceedings to raise the constitutional and statutory preemption argument. Based on these findings, the court stated that abstention was required. (A-1) 925 F.2d 962 (6th Cir. 1991).

REASONS FOR GRANTING THE WRIT

I.

In Failing To Consider The Effect of Congress' Clear And Unambiguous Intention To Prelude Any State Regulation Of The Rates, Routes, And Services Of A Certificated Air Carrier, The Court Of Appeals Has Created A Conflict With The Ninth And Eleventh Circuits And Has Ignored This Court's Recognition In *New Orleans Public Service Commission v. New Orleans*, 105 L.Ed.2d 298 (1989) That *Younger* Abstention May Not Be Appropriate Where Preemption Is Clear-Cut

In *New Orleans Public Service Commission v. New Orleans*, 105 L.Ed.2d 298 (1989) *(NOPSI)*, this Court recognized a possible exception to the abstention doctrine expressed earlier in *Younger v. Harris*. 401 U.S. at 53-54. Where preemption of state action by federal statute is clear-cut and "facially conclusive", this Court recognized that abstention under such circumstances might not be appropriate. 105 L.Ed.2d at 316. *See also Public Utilities Commission v. Ohio United Fuel Gas Company*, 317 U.S. 456 (1943) (Where efforts to regulate prices patently invalid, injunction against state action issued).

Prior to *NOPSI*, both the Ninth and Eleventh Circuits had held abstention inappropriate where federal preemption of state action was deemed clear. In *Champion International Corporation v. Brown*, 731 F.2d 1406 (9th Cir. 1984), the Ninth Circuit Court of Appeals held that where "Congress has shown clearly its interest in uniform regulation of pension plans and its intention [through ERISA] 'to establish pension plan regulation as exclusively a federal concern'", Montana's efforts to enforce conflicting age discrimination laws were not appropriate for *Younger* abstention.

Similarly, in *Baggett v. Department of Professional Regulation*, 717 F.2d 521 (11th Cir. 1983), the Eleventh Circuit Court of Appeals held that the state's efforts to prosecute an operator of an enrolled vessel for intoxication were clearly preempted by federal statute and thus abstention was wholly inappropriate. In the Eleventh Circuit's words:

> When preemption is readily apparent, however, and, because of preemption, the state tribunal is acting beyond the lawful limits of its authority, "abstention can serve no principal of comity or of 'our federalism' ".

Baggett, 717 F.2d at 524 (quoting *Empire, Inc. v. Ashcroft*, 524 F. Supp. 898 (W.D. Mo. 1981)).

The situation presented in *Baggett* and *Champion*, and reserved by this Court in *NOPSI* is precisely the situation here. The preemption language in 49 U.S.C. § 1305 is all inclusive and absolutely prohibits economic regulation by any state entity of the activities of a certificated air carrier. The analysis of the preemptive effect of 49 U.S.C. § 1305 and the Supremacy Clause by the Commission in the administrative proceeding clearly exceeded its jurisdiction. *See Metropolitan Government of Nashville and Davidson County, Tennessee v. State Board of Equalization*, SA-156, (Tenn. App. 1988) (unpublished) (Administrative boards and agencies in Tennessee have no jurisdiction to decide constitutional issues).

The enactment or enforcement of any state law or regulation "relating to [the] rates, routes, or services of an air carrier" is specifically prohibited by 49 U.S.C. § 1305. Three recent cases cited but not applied by the Court of Appeals hold there is no room for any state regulation which impacts an air carrier's rates, routes, or services.

In the latest of these cases, *Transworld Airlines, Inc. v. Maddux*, 897 F.2d 773 (5th Cir. 1990), *cert. denied*, 111 S.Ct. 307, 308

(1991), the Texas Attorney General contended that TWA's ticket price advertising was deceptive and violated Texas consumer fraud laws. Texas was joined by attorneys general from thirty-three other states in this claim. Together they claimed that § 1305(a) only preempted state regulation of the airline's rates, routes, and services, but did not expressly preclude state regulation relating to all airline operations such as advertising. *Maddux*, 897 F.2d at 779. TWA, joined by several other air carriers, responded that § 1305(a)(1) is to be read broadly and that "advertising of fares by airlines clearly relates to rates." The District Court agreed and enjoined the thirty-three attorneys general from enforcing state advertising statutes against the airlines. On appeal the Fifth Circuit affirmed, finding express preemption and also holding that there was no reason to balance any alleged harm to the states from the issuance of an injunction since the states had no interest to protect in light of the preemption. *Maddux*, 897 F.2d at 784.

The language in the Fifth Circuit's conclusion is particularly instructive:

> An examination of the preemption language in § 1305(a)(1) and its legislative history leads to the conclusion that Congress did intend to preempt so completely the particular area of state laws "relating to rates, routes, or services" *as to preclude state court actions*. Congress preempted this area to maintain uniformity and to avoid the confusion and burdens that would result if interstate and international airlines were required to respond to standards of individual states. We agree with the First Circuit that Congress "did not intend to leave a vacuum to be filled by the Balkanizing forces of state and local regulation." *New England Legal Foundation v. Massachusetts Port Authority*, 883 F.2d 157 (1st Cir. 1989). Congress made this clear by including the express preemption provision in the Deregulation Act. The legislative history of § 1305 exhibits a

> Congressional intent to treat a complaint raising "this select group of claims" as necessarily federal in character. (Emphasis supplied.)

897 F.2d at 787.

The Congressional intent behind 49 U.S.C. § 1305 noted in *Maddux* is equally apparent here. Just as regulation of airline advertising by fifty different states inherently impedes the operation of air carriers which Congress sought to protect, the application of differing motor carrier standards of fifty states to the small number of intrastate parcels transported solely on the ground in each state necessarily impedes Federal Express' air carrier service and impacts its rates, routes, and services. The impact is direct and immediate, and accordingly under *Maddux*, preemption of both state agency and state court actions is clear.

Two other recent Court of Appeals cases support this reading of § 1305(a)(1). In *Illinois Corporate Travel v. American Airlines*, 889 F.2d 751 (7th Cir. 1989), *cert. denied*, 110 S.Ct. 1948 (1990), a travel agency sued American claiming that its ban on advertising discounts on American Airline ticket prices violated the Sherman Act and the Illinois consumer fraud and deceptive practices statute. The Seventh Circuit affirmed the dismissal of the state law claims on the grounds that enforcement of the state statutes relates to rates "within the meaning of § 1305(a)(1)." The Seventh Circuit opinion demonstrates again that preemption is triggered when enforcement of the state law affects rates, routes, or services of an air carrier. Advertising by airlines, like the use of trucks by Federal Express, is an airline service.

In the third case, *New England Legal Foundation v. Massachusetts Port Authority*, 883 F.2d 157 (1st Cir. 1989), the First Circuit held that the Massachusetts Port Authority's attempt to raise landing fees at Logan Airport was preempted by § 1305(a)(1) because landing fees are "related to rates." Again, the First

Circuit was specifically concerned about the impact of inconsistent state and local regulations upon a national air carrier.

Thus, three Courts of Appeal have held that § 1305(a) is to be read very broadly, and clearly protects Federal Express' transportation activities from any state regulation impacting its rates, routes, and services. These opinions have also shown that § 1305(a) sets forth an unambiguous and facially conclusive claim of preemption.[10] When these cases are read alongside *Baggett* and *Champion*, which recognize that clear-cut claims of preemption are not appropriate for abstention, a conflict between the circuits is created. Accordingly, resolution by this Court of the issue reserved in *NOPSI* is necessary.

The Sixth Circuit Court of Appeals addressed but did not apply the exception to abstention reserved in *NOPSI* and applied by the other circuits. Instead, the Sixth Circuit in this case held fast to its previous ruling in *CSXT, Inc. v. Pitz,* 883 F.2d 468 (6th Cir. 1989), *cert. denied,* 110 S.Ct. 1480 (1990), that the presence of a preemption issue does not modify the abstention analysis, regardless of whether preemption is clear. (A-12) 925 F.2d at 968. This holding is in conflict with *Baggett* and *Champion, supra,* and calls for a resolution of the issue reserved in *NOPSI* by this Court.

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[10] It should be noted that a District Court in California has read Section 1305 very narrowly to include only "singularly airline services," and has thereby indicated that Section 1305 has no bearing on intrastate ground transportation in the state of California. However, the above cases were not supplied to the District Court when this opinion was written, and this case is now on appeal. *See Federal Express Corporation v. California Public Utilities Commission, et al.*, 723 F. Supp. 1379 (N.D. Cal. 1989).

II.

The Court of Appeals' Refusal To Bind The State To Its Previous Positions Regarding Abstention Threatens Judicial Resources And Calls Upon This Court To Exercise Its Supervision

The Court of Appeals' holding that this is not an appropriate case for application of the waiver doctrine combined with its repeated indications that *Younger* abstention may be raised *sua sponte* by the court come very close to raising *Younger* abstention to a jurisdictional level. This Court has made clear that abstention is not jurisdictional, but is an equitable doctrine which may be waived by state authorities. *Ohio Bureau of Employment Services v. Hodory,* 431 U.S. 471, 479-80 (1977). Other circuits have also held that findings of waiver or estoppel are proper and that *Younger* abstention is not jurisdictional. *Universal Amusement Company, Inc. v. Vance,* 587 F.2d 159, 163, n. 6 (5th Cir. 1978), *aff'd* 445 U.S. 308 (1980) (*Younger* abstention is non-jurisdictional and may be waived); *First Fidelity Savings and Loan v. Greenwald,* 591 F.2d 417, 424-425 (1st Cir. 1979) (Commissioner's actions in not specifically arguing *Younger* abstention came close to waiving any claim that the District Court should abstain); *Midkiff v. Tom,* 702 F.2d 788, 803 (9th Cir. 1983), *rev'd sub nom on other grounds,* 467 U.S. 229 (1984) (Where abstention not addressed until the court raised the subject at oral argument, abstention was deemed waived); *Association of Community Organizations v. Municipality of Golden, Colorado,* 744 F.2d 739, 743, n. 2 (10th Cir. 1984) (State may waive the protection of *Younger* abstention and did so where state attorney asked for abstention on other grounds).

Here, the Court of Appeals found an abundance of facts supporting waiver or estoppel, yet refused to impose the equitable doctrines. The record reveals as follows:

1. The Commission did not plead abstention in its answer. (Answer: SA-42.)

2. The Commission did not file a motion requesting that the court abstain.

3. The Commission urged the District Court at a status conference to hold a speedy hearing on the merits of the case, accompanied by a brief which stated:

> If the court makes a decision on the merits of this case before August 25, 1987, no preliminary injunction will be necessary. . . .A consolidation will not prejudice the right of Federal Express to present its case and be heard on the merits. . . .Federal Express should have no problem presenting its case on the merits at a preliminary injunction hearing scheduled for August 20, 1987.

(Memorandum in Support of Motion to Consolidate Preliminary Injunction Hearing with Trial on the Merits, August 18, 1987: SA-35-41.)

4. The Commission filed a pretrial brief which never mentioned abstention and urged the court to examine the merits of the case and find for the Commission.

> Based on the foregoing arguments, defendants urge the court to find that Tennessee intrastate transportation provided by Federal Express wholly by motor vehicle is subject to Commission regulation and to dismiss this case.

(Pretrial Brief, August 18, 1987: SA-70.)

5. After the District Court had raised abstention *sua sponte*, the Public Service Commission argued just prior to trial that the court should abstain under *Burford v. Sun Oil Company*, 319 U.S. 315 (1943), not *Younger v. Harris*, 401 U.S. 37 (1971). (A-7) 925 F.2d at 966; Supplement to Trial Brief (SA-72).

6. Before the conclusion of the trial, the Public Service Commission dropped its *Burford* abstention argument stating:

> Your Honor, the abstention issue is no longer an issue in this case. There is no longer a pending state court decision. There is no longer any reason for you to await the outcome of that decision.

(Tr. (September 10, 1987), p. 214: SA-100.)

7. The Commission raised its *Younger* abstention argument for the first time several months after trial of the case.

(Supplemental Brief of the Tennessee Public Service Commission, November 12, 1987: SA-72.)

For the Court of Appeals to hold that the Commission's actions and inactions do not constitute waiver or estoppel departs from the accepted and usual course of judicial proceedings where equitable defenses are raised. This departure, when added to the full trial that has taken place, significantly threatens the expeditious and economic functioning of our judiciary. The Sixth Circuit has effectively told state attorneys that no matter how late they raise abstention, how often they change their position regarding abstention, or how much time a court spends on their case before they finally decide to argue clearly that the merits should not be reached and the basis for their argument, they are never in jeopardy of waiving *Younger* abstention or in being estopped from raising *Younger* abstention.[11]

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[11] In *First Federal Savings and Loan v. Greenwald*, 591 F.2d 417 (1st Cir. 1979), the First Circuit held that the Commission's failure to argue abstention at the trial level came close to waiver of that claim. As the court stated: "To have to send this already decided case to another tribunal at this juncture would, especially under these circumstances, be an unwarranted waste of resources." 591 F.2d at 425 (*citing Provident Tradesmens Bank and Trust Company v. Patterson*, 390 U.S. 102, 126 (1968).

(Footnote 11 continued on next page)

Federal Express respectfully submits that if abstention is appropriate and the state truly is concerned about federal intervention in state proceedings it believes are ongoing, then this Court should exercise its supervisory role and place the burden on the state to see that this equitable defense is raised expeditiously and effectively.

III.

The Court of Appeals' Opinion Conflicts In Principle With The Fifth Circuit's Decision In *Thomas v. Texas State Board Of Medical Examiners*, 807 F.2d 453 (5th Cir. 1987), Which Held That A Plaintiff Was Not Bound To Continue His Appeal Of A State Administrative Decision In State Court

The Court of Appeals has applied rigidly its "date of filing" rule and held that abstention was required since state proceedings were pending on the date the federal complaint was filed, even though the state proceedings were dismissed before trial. In so doing, the court has attempted to distinguish *Thomas v. Texas State Board of Medical Examiners*, 807 F.2d 453 (5th Cir. 1987), stating that the plaintiff in *Thomas* dismissed his state appeal

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(Footnote 11 continued)

In *Provident Tradesmens Bank and Trust Company v. Patterson*, The Court stated regarding abstention:

> While we do not now declare that a Court of Appeals may never on its own motion compel dismissal of an action as an unwarranted intrusion upon state adjudication of state law, we do conclude that, this being a discretionary matter, the existence of a verdict reached after a prolonged trial in which the defendants did not invoke the pending state action should be taken into consideration in deciding whether abstention is the wiser course.

Provident Tradesmens Bank and Trust Company v. Patterson, 390 U.S. 102, 126 (1968).

before filing his federal complaint. (A-13) 925 F.2d at 962. This effort to distinguish *Thomas* fails because the policies set forth in *Thomas* apply equally to this case.

In *Thomas,* the Fifth Circuit reversed the District Court's decision to abstain from deciding plaintiff physician's claim attacking the state's revocation of his medical license. The plaintiff in *Thomas* initially pursued an appeal in state court and then dismissed the appeal seeking a determination of his federal constitutional claims in federal court. The Fifth Circuit stated:

> A person who contends that his constitutional rights have been violated by a state administrative proceeding is not required to resort to an appeal to state courts before seeking relief in a federal forum. At the time this suit was filed, no state action was pending. . . .
>
> Thomas [the plaintiff] did invoke state judicial relief, but he dismissed that suit before filing his federal action. A litigant who initiates state court review of a state administrative decision and then changes his mind and voluntarily dismisses his suit is not irrevocably bound either to continue his action in state court or to forfeit his right to vindicate his constitutional rights in the federal court. When no state proceedings are pending, federal action does not interfere with or insult state processes and "the policies on which the *Younger* doctrine is premised have little force. . . ."

807 F.2d at 456-57.

In refusing to apply *Younger,* the Fifth Circuit relied upon the longstanding precedent from the Supreme Court in *Bacon v. Rutland Rail Company,* 232 U.S. 134 (1914) relied upon by this Court in *Huffman v. Pursue, Ltd.,* 420 U.S. 592, 610, n. 21 (1975), holding that a plaintiff need not exhaust his state court appellate remedies before challenging adverse state administrative decisions in federal court.

Here, as in *Thomas,* there are no considerations of comity present. A decision to dismiss an appeal is no different in this respect than a choice not to appeal. Deference to a state proceeding is not due when the "administrative proceedings have ended", and where "no state trial has taken place and no injunction against a pending state proceeding is sought." *Thomas, supra,* at p. 456.

Accordingly, Federal Express respectfully submits that the Court of Appeals decision in this case conflicts in principle with the Fifth Circuit's decision in *Thomas v. Texas State Board of Medical Examiners* and submits that this conflict should be resolved.

CONCLUSION

This case presents a compelling opportunity for this Court to clarify its decisions and to resolve conflicting decisions of other circuits regarding *Younger* abstention where federal preemption of state regulatory activities is an issue. It also presents a case where the Court's supervisory powers are called into action to prevent the waste of judicial resources that occurred in the full trial of this case, and in the entry of three separate District Court opinions and three separate appellate opinions prior to the filing of this petition.

Federal Express respectfully submits that the issues presented herein warrant the granting of this petition for certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed on the 15th day of May, 1991 to Mr. Henry Walker, Tennessee Public Service Commission, 460 James Robertson Parkway, Nashville, TN 37219, who is counsel for all respondents.

WILLIS & KNIGHT

By: Marian F. Harrison

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APPENDIX A

FEDERAL EXPRESS CORPORATION,
Plaintiff-Appellant,

v.

TENNESSEE PUBLIC SERVICE COMMISSION, et al.,
Defendants-Appellees.

No. 90-5596.

United States Court of Appeals,
Sixth Circuit.

Argued Jan. 23, 1991.
Decided Feb. 14, 1991.

Carrier brought action seeking declaration that Tennessee Motor Carrier Act was expressly preempted by Airline Deregulation Act and impliedly preempted by commerce clause. The United States District Court for the Middle District of Tennessee, Thomas A. Wiseman, Jr., Chief Judge, 693 F. Supp. 598, dismissed action for lack of subject matter jurisdiction, and carrier appealed. The Court of Appeals, 878 F.2d 381, affirmed. Carrier petitioned for rehearing en banc. The Court of Appeals, 909 F.2d 1483, reversed and remanded. On remand, the District Court, 738 F. Supp. 1140, dismissed action, and carrier appealed. The Court of Appeals, Milburn, Circuit Judge, held that: (1) Tennessee Public Service Commission had not waived abstention argument, and (2) abstention under *Younger* doctrine was appropriate.

Affirmed.

William R. Willis, Jr., Marian F. Harrison (argued), Willis & Knight, Nashville, Tenn., for plaintiff-appellant.

Henry M. Walker (argued), Tennessee Public Service Com'n, Nashville, for defendant-appellee.

Before KEITH and MILBURN, Circuit Judges, and CONTIE, Senior Circuit Judge.

MILBURN, Circuit Judge.

Plaintiff-appellant Federal Express Corporation appeals the judgment of the district court dismissing on grounds of abstention its action seeking a declaration that the Tennessee Motor Carrier Act, Tennessee Code Annotated § 65-15-101 *et seq.*, is expressly preempted by the Airline Deregulation Act of 1978, 49 U.S.C.App. § 1305, and impliedly preempted by the commerce clause, 738 F. Supp. 1140. For the reasons that follow, we affirm.

I.

Federal Express is a recognized leader in the overnight delivery business. "Approximately 90 percent of all packages transported by Federal Express are sorted at its Superhub in Memphis, Tennessee, the corporation's principal place of business." *Federal Express Corp. v. Tennessee Public Serv. Comm'n*, 693 F. Supp. 598, 600 (M.D. Tenn. 1988), *rev'd without opinion*, 909 F.2d 1483 (6th Cir. 1989) (table). "Of the more than 700,000 packages transported nightly, approximately 1000 have both an origin and destination in Tennessee." *Id.* "Federal Express estimates that it transports approximately 500 packages per night by motor vehicle solely within the state of Tennessee." *Id.*

On July 2, 1986, the Tennessee Public Service Commission (TPSC) directed Federal Express to show cause why it was not subject to the Tennessee Motor Carrier Act, Tenn. Code. Ann.

65-15-102. A hearing was held before an administrative law judge (ALJ) who ruled that Federal Express was a motor carrier under Tennessee law and was therefore required to apply for a certificate of convenience and necessity from the TPSC. The TPSC reviewed the ALJ's decision and following oral argument, the TPSC issued an order on June 9, 1987, ordering Federal Express to apply for a certificate of convenience and necessity to operate as an intrastate motor carrier. "The TPSC gave Federal Express 30 days to comply with its order, later extending that deadline to August 25, 1987." *Federal Express*, 693 F. Supp. at 601.

On July 9, 1987, Federal Express filed with the Tennessee Court of Appeals a petition for review of the TPSC's order and an application for an immediate stay of the order. On August 6, 1987, the Tennessee Court of Appeals denied the application for a stay of the TPSC's order. In its one-page order, the court stated that the application for a stay was denied "on condition that compliance with said order of the Public Service Commission will not prejudice the prosecution of the present proceeding for review of said order." J.A. at 653.

On August 7, 1987, Federal Express filed the present action in the district court seeking declaratory and injunctive relief against the TPSC.[1] Federal Express argued that the Tennessee Motor Carrier Act was expressly preempted by the Airline Deregulation Act of 1978, 49 U.S.C.App. § 1305, and impliedly preempted by the commerce clause. Federal Express filed a motion for a temporary restraining order which the district court granted on August 10, 1987. The district court stated in its order that there was a substantial risk of irreparable injury to Federal Express "because submission to the jurisdiction of the Public

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[1] "Purolator Courier, a competitor with Federal Express that has complied with the Tennessee Motor Carrier Act, was permitted to intervene as a defendant." *Federal Express*, 693 F. Supp. at 601.

Service Commission by filing an application may render moot the plaintiff's constitutional and federal statutory claims, and unduly interfere with and harm the plaintiff's alleged integrated transportation system developed under Federal authorization." J.A. at 135-36.

On September 9, 1987, prior to the district court's hearing arguments on the motion for a preliminary injunction, Federal Express filed a motion to voluntarily dismiss its petition for review in the Tennessee Court of Appeals, which the court granted on September 11, 1987. Pursuant to a motion by the TPSC, the district court consolidated the hearing on the motion for a preliminary injunction with a bench trial on the merits, and the consolidated proceeding was conducted on September 11 and 12, 1987.

On June 16, 1988, the district court issued an opinion and order dismissing the case for lack of federal subject matter jurisdiction. *See Federal Express Corp. v. Tennessee Public Serv. Comm'n*, 693 F. Supp. 598 (M.D. Tenn. 1988). The TPSC and intervenor Purolator Courier filed a motion for reconsideration, arguing that the court had jurisdiction pursuant to *Shaw v. Delta Air Lines*, 463 U.S. 85, 96 n. 14, 103 S. Ct. 1890, 2899 n. 14, 77 L.Ed.2d 490 (1983), but that the court should abstain from a decision on the merits. The court denied the motion and adhered to its decision dismissing the action for lack of jurisdiction.

Federal Express appealed the dismissal of its action and a panel of this court initially affirmed the judgment of the district court. *Federal Express Corp. v. Tennessee Public Serv. Comm'n*, 878 F.2d 381 (6th Cir. 1989) (unpublished opinion). However, Federal Express filed a petition for rehearing en banc, and the panel amended its original opinion and reversed the judgment of the district court. *Federal Express Corp. v. Tennessee Public Serv. Comm'n*, 909 F.2d 1483 (6th Cir. 1989) (unpublished order). The panel remanded the case for further proceedings

"including consideration of the question of abstention in view of this court's opinion in" *CSXT, Inc. v. Pitz*, 883 F.2d 468 (6th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S. Ct. 1480, 108 L.Ed.2d 616 (1990).

On remand, the parties briefed the abstention issue, and following a hearing, the district court entered an order on April 23, 1990, dismissing the action on the basis of the abstention doctrine of *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L.Ed.2d 669 (1971). Using the three-step analysis for *Younger* abstention, the court first applied the day-of-filing rule to conclude that Federal Express' petition for review in the Tennessee Court of Appeals constituted an ongoing state judicial proceeding. Second, the court held that Tennessee has an important state interest in regulating the intrastate trucking industry. Third, the court concluded that Federal Express had an adequate opportunity to raise its constitutional concerns in the state proceedings. The court also held that the TPSC had not waived the abstention argument. Accordingly, the district court dismissed the case and dissolved the injunction against the TPSC. This timely appeal followed.

The principal issue on appeal is whether the district court erred by applying the *Younger* abstention doctrine.

II.

A. Waiver

Before reviewing the district court's application of the *Younger* abstention doctrine, we must address Federal Express' contention that the TPSC has waived the abstention argument. Federal Express argues that the TPSC waived any abstention argument because it did not plead abstention in its answer, it did not file a motion for abstention, it urged the district court to hold a hearing on the merits of the case, and at the hearing, counsel for TPSC stated that abstention was no longer an issue in the case since the

state court appeal had been dismissed. Federal Express asserts that the TPSC raised the *Younger* abstention argument for the first time two months after the bench trial when the district court asked the parties to brief the issue of res judicata. Thus, Federal Express contends that the TPSC waived the abstention argument by not actively pursuing the issue. *See City of Paducah v. Investment Entertainment*, 791 F.2d 463, 471 (6th Cir.) (Wellford, J., concurring), *cert. denied*, 479 U.S. 915, 107 S. Ct. 316, 93 L.Ed.2d 290 (1986).[2]

Younger abstention is "designed to allow the State an opportunity to 'set its own house in order' when the federal issue is already before a state tribunal." *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 479-80, 97 S. Ct. 1898, 1903-04, 52 L.Ed.2d 513 (1977). "If the State voluntarily chooses to submit to a federal forum, principals of comity do not demand that the federal court force the case back into the State's own system." *Id.* at 480, 97 S. Ct. at 1904. "[F]ailure to raise abstention could arguably amount to waiver of its application. . . ." *Hughes v. Lipscher*, 906 F.2d 961, 964 (3d Cir. 1990). However, in each case where the Supreme Court has found waiver of the abstention argument, "the State expressly urged [the] Court or the District Court to proceed to an adjudication of the constitutional merits." *Ohio Civil Rights Comm'n v. Dayton Christian Schools*, 477 U.S. 619, 626, 106 S. Ct. 2718, 2722, 92 L.Ed.2d 512 (1986).

In the present case, the abstention issue was first raised by the district court during a status conference on August 20, 1987. Although the TPSC did not plead abstention in its answer,

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[2] Federal Express' reliance on Judge Wellford's concurring opinion in *City of Paducah* is misplaced because in that case Judge Wellford concluded that the abstention issue had been abandoned on appeal, not waived by failure to raise it in the district court. Moreover, a concurring opinion has no binding authority.

Federal Express has cited no case requiring abstention to be raised in the pleadings. Indeed, the Supreme Court has indicated that "abstention may be raised by the court *sua sponte*." *Bellotti v. Baird*, 428 U.S. 132, 143 n.10, 96 S. Ct. 2857, 2864 n.10, 49 L.Ed.2d 844 (1976); *See also Louisiana Power & Light v. Thibodaux*, 360 U.S. 25, 79 S. Ct. 1070, 3 L.Ed.2d 1058 (1959).

After the district court raised the abstention issue, the TPSC filed a supplemental trial brief on September 2, 1987, arguing for abstention. However, in its brief, the TPSC argued for *Burford*-type[3] abstention rather than *Younger* abstention. At the outset of the consolidated hearing and trial before the district court on September 11-12, 1987, the district judge directed the parties to address the abstention issue. The TPSC urged the district court to abstain, arguing that abstention is appropriate where "there is an ongoing State proceeding where the Federal plaintiff has a chance to raise his constitutional issue. . . ." J.A. at 366. The TPSC cited *Ohio Civil Rights Comm'n v. Dayton Christian Schools*, 477 U.S. 619, 106 S. Ct. 2718, 91 L.Ed.2d 512 (1986), a case applying *Younger* abstention, to support its argument. Counsel for Federal Express had moved to dismiss its state court appeal on September 9, 1987, and counsel argued that the court should not abstain from hearing the case because there was no pending state action. Counsel for Federal Express argued that there was no basis for abstention under *Burford*, *Pullman*, or *Younger*. The district judge postponed consideration of the abstention issue and proceeded with the evidentiary hearing.

After receiving evidence and testimony on the merits, the court heard arguments from the parties on September 12, 1987, during which counsel for TPSC conceded that abstention was no longer an issue in the case because there was no pending state

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[3] *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S. Ct. 1098, 87 L.Ed. 1424 (1943) (abstention to avoid conflict with a state's administration of its own affairs.)

court action. However, counsel for intervenor Purolator Courier argued that under the *Younger* doctrine the abstention issue remained alive until the Tennessee Court of Appeals acted on Federal Express' motion to dismiss its appeal. The court invited the parties to submit supplemental briefs, and on November 12, 1987, the TPSC filed a supplemental brief retracting counsel's concession at the hearing that abstention was no longer an issue in the case. The TPSC stated that further research had revealed that *Younger* abstention, rather than the *Burford*-type, was applicable to this case, and that the abstention issue was not mooted by Federal Express' dismissal of its state court appeal.

Our review of the proceedings in the district court reveals that the TPSC did not waive the abstention argument. As noted earlier, the TPSC was not required to raise abstention in the pleadings. When the district court raised the issue sua sponte, the TPSC argued for abstention. With the exception of the concession made by the TPSC at the hearing on September 12, 1987, which was retracted by its supplemental brief, the TPSC has persistently argued for abstention. Moreover, we view the TPSC's motion to consolidate the preliminary injunction hearing with a trial on the merits as a means of avoiding duplicative proceedings rather than a request for the court to reach the merits of the constitutional issue. Furthermore, it should be noted that on October 6, 1989, this court remanded this case to the district court for further proceedings including consideration of the question of abstention. Accordingly, we conclude that the TPSC did not waive the abstention argument.

B. Abstention

We conduct a *de novo* review of a district court's abstention decision. *Litteral v. Bach*, 869 F.2d 297, 298 (6th Cir. 1989) (per curiam); *Traughber v. Beauchane*, 760 F.2d 673, 676 (6th Cir. 1985). Generally, *Younger* abstention is appropriate only where a court can answer the following three questions in the affirmative:

> *[F]irst*, do [the relevant state proceedings] . . . constitute an ongoing state judicial proceedings; *second*, do the proceedings implicate important state interests, and *third*, is there an adequate opportunity in the state proceedings to raise constitutional challenges.

Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432, 102 S. Ct. 2515, 2521, 73 L.Ed.2d 116 (1982). Before applying the three-step analysis in the present case, we must address Federal Express' argument that abstention is inappropriate because Congress has preempted the regulation of air carriers by the Airline Deregulation Act of 1978, 49 U.S.C.App. § 1305.

In *CSXT, Inc. v. Pitz*, 883 F.2d 468, 471 (6th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S. Ct. 1480, 108 L.Ed.2d 616 (1990), we faced the question of whether "the fact that this case raises preemption rather than other types of constitutional issues require[s] us to modify the classic abstention analysis?" We held that there was no "reason to analyze abstention cases involving a preemption claim differently than other abstention cases." *Id.* at 473. We concluded that when confronted with a preemption claim, a court need only ask two questions:

> whether the state court has concurrent judicial jurisdiction to decide the preemption question, and, if the answer to that question is "Yes, "whether a federal court should abstain in favor of ongoing state proceedings originating in the state regulatory agency.

Id. at 473-74.

Federal Express attempts to distinguish *CSXT* by arguing that the preemption language in the Airline Deregulation Act, 49 U.S.C.App. § 1305, "absolutely prohibits economic regulation by state agencies of the activities of a certified air carrier." Appellant's Brief at 20. The statutory language relied on by Federal Express states:

> Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

49 U.S.C.App. § 1305(a)(1). The key phrase is "relating to rates, routes, or services of an air carrier." *Id.* Federal Express relies on three recent decisions holding that the state regulation of an air carrier's rates, routes, or services was preempted by section 1305(a). *See Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773 (5th Cir.) (state regulation regarding advertising of airline fares preempted), *cert. denied*, ___ U.S. ___, 111 S. Ct. 307, 112 L.Ed.2d 261 (1990); *Illinois Corporate Travel v. American Airlines*, 889 F.2d 751 (7th Cir. 1989) (same), *cert. denied*, ___ U.S. ___, 110 S. Ct. 1948, 109 L.Ed.2d 311 (1990); *New England Legal Found. v. Massachusetts Port Auth.*, 883 F.2d 157 (1st Cir. 1989) (state scheme to impose landing fee preempted). In each case, the court construed the "relating to" language in section 1305(a)(1) broadly to find state action preempted.

In *Mattox* the court observed:

> An examination of the preemption language in § 1305(a)(1) and its legislative history leads to the conclusion that Congress did intend to preempt so completely the particular area of state laws "relating to rates, routes, or services" as to preclude state court actions. Congress preempted this area to maintain uniformity and to avoid the confusion and burdens that would result if interstate and international airlines were required to respond to standards of individual states. We agree with the First Circuit that Congress "did not intend to leave a vacuum to be filled by the Balkanizing forces of state and local regulations." *New England Legal Foundation*, 883 F.2d at 173. Congress made this clear by

> including the express preemption provision in the Deregulation Act.

Mattox, 897 F.2d at 787. Federal Express contends that its intrastate trucking system is "related to" its services as an air carrier, and, accordingly, section 1305 preempted the TPSC's regulation of its trucking system.[4]

Federal Express argues that since preemption under section 1305 is clear, the district court erred by abstaining from ruling on the merits. Federal Express attempts to distinguish *CSXT* by arguing that "the nature of the regulation in *CSXT* was so intertwined between state and federal governments that there was no clear argument that tensions cut in favor of federal rather than state action." Appellant's Brief at 19. Finally, Federal Express asserts that "prosecution of the state proceedings, particularly in the absence of a stay pending full appellate review 'threatens impairment of federal rights,' *CSXT*, 883 F.2d at 475, and begins the Balkanizing process of piecemeal regulation which Congress feared and sought to prevent through the enactment of § 1305(a)." Appellant's Brief at 24.

We reject Federal Express' argument against abstention on the basis of federal preemption.[5] In our view, Federal Express has failed to distinguish our ruling in *CSXT*. In *CSXT*, we held

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[4] The only court to address this specific issue reached the opposite conclusion. In *Federal Express Corp. v. California Public Util. Comm'n*, 716 F. Supp. 1299, 1302-03 (N.D. Cal. 1989), the court held that section 1305 did not preempt state regulation of Federal Express' intrastate trucking operation in California. This case is presently on appeal to the Ninth Circuit.

[5] The TPSC asserts that Federal Express did not raise this preemption argument in the proceedings before the district court on remand. However, we conclude that the preemption argument was adequately presented to the district court and we address the merits of the issue.

that the presence of a preemption issue would not modify the classic abstention analysis so long as the state court has concurrent judicial jurisdiction to decide the preemption question. "State courts normally have concurrent jurisdiction of federal issues unless such jurisdiction is withdrawn by federal statute." *CSXT*, 883 F.2d at 472. Section 1305 does not purport to restrict the *jurisdiciton* of state courts, and Federal Express has not shown that federal courts have exclusive jurisdiction to resolve preemption claims under the Airline Deregulation Act. Therefore, we hold that the Tennessee Court of Appeals had concurrent jurisdiction to address the preemption issues.

Before applying the three-part *Younger* analysis, we briefly address the implications of the Supreme Court's decision in *New Orleans Public Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, ___ __ ___, 109 S. Ct. 2506, 2518-19, 105 L.Ed.2d 298 (1989), in which the Court held that while the *Younger* abstention doctrine may be applicable to administrative proceedings which are judicial in nature, it does not apply to administrative proceedings which are legislative or executive in nature. In *New Orleans Public Serv., Inc.*, the Supreme Court explained that a proceeding is judicial in nature when it "investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist." 109 S. Ct. at 2519 (quoting *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226, 29 S. Ct. 67, 69, 53 L.Ed. 150 (1908)). In the present case, the district court concluded that the administrative proceedings were judicial rather than legislative, and Federal Express has not challenged this determination on appeal. Although the issue is not contested, we conclude that the district court properly determined that the administrative proceedings were judicial in nature. *See Sun Refining & Marketing Co. v. Brennan*, 921 F.2d 635, 639-40 (6th Cir. 1990). Accordingly, the three-part *Younger* analysis is applicable to this case.

The first inquiry under the *Younger* analysis is whether the state proceedings constitute an ongoing state judicial proceeding. The district court applied the day-of-filing rule to conclude that the underlying state proceedings were ongoing. Federal Express contends that there was no ongoing state proceeding which it sought to enjoin. Federal Express argues, "deference to a state proceeding is not due when the 'administrative proceedings have ended,' and where 'no state trial has taken place and no injunction against a pending state proceeding is sought.' " Appellant's Brief at 29 (quoting *Thomas v. Texas State Bd. of Medical Examiners*, 807 F.2d 453, 456 (5th Cir. 1987)). Federal Express also cites *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 609 n. 21, 95 S. Ct. 1200, 1210 n. 21, 43 L.Ed.2d 482 (1975), for the proposition that a party "aggrieved by a state administrative proceeding . . . may choose to seek judicial relief for his constitutional claims in a federal court and need not exhaust his state judicial remedies." Appellant's Brief at 27. Federal Express asserts that its decision to dismiss its appeal is no different than a choice not to appeal.

In *Zalman v. Armstrong*, 802 F.2d 199, 204 (6th Cir. 1986), we held "that the proper time of reference for determining the applicability of *Younger* abstention is the time that the federal complaint is filed." Under this rule, if a state proceeding is pending at the time the action is filed in federal court, the first criteria for *Younger* abstention is satisfied. *See Beltran v. California*, 871 F.2d 777, 782 (9th Cir. 1988). In the present case, state proceedings were ongoing because Federal Express' petition for review in the Tennessee Court of Appeals was pending on the date it filed the present action. Federal Express' reliance on *Thomas* is misplaced because in that case, the plaintiff dismissed his state suit before filing the federal action. *Thomas*, 807 F.2d at 457. Therefore, under the day-of-filing rule, Federal Express' subsequent dismissal of its state court action did not affect the abstention analysis. Federal Express' reliance on the footnote in *Huffman* is misplaced because the Court

stated that in those cases where exhaustion had not been required, the state judicial process had not been initiated. *Huffman*, 420 U.S. at 609 n. 21, 95 S. Ct. at 1211 n. 21. To the contrary, in the present case, Federal Express had initiated state judicial proceedings, and we hold that the state court proceedings were "ongoing" for purposes of *Younger* analysis.

The second inquiry under the *Younger* analysis is whether the state proceedings implicate important state interests. The district court held that this element of *Younger* was satisfied because Tennessee has an important interest in regulating intrastate trucking. Federal Express does not challenge the district court's ruling on this point. Accordingly, the second prong of the three-part test is satisfied.

The final inquiry is whether there was an adequate opportunity in the state proceedings to raise constitutional issues. The district court concluded that this element was satisfied because Federal Express' constitutional claims could have been raised in the pending state proceedings. Federal Express argues that it did not have an adequate opportunity to protect its federal statutory and constitutional claims because the state court refused to grant a stay of the licensing process. Federal Express contends that without a stay it would have to file an application for a certificate of public convenience and necessity with the TPSC, and it asserts that voluntary submission to the TPSC's jurisdiction would threaten to moot its federal constitutional and statutory claims.

Federal Express' argument misconceives the nature of the inquiry. The "pertinent inquiry is whether the state proceedings afford an adequate opportunity to raise the constitutional claims. . . ." *Moore v. Sims*, 442 U.S. 415, 430, 99 S. Ct. 2371, 2381, 60 L.Ed.2d 994 (1979). "[T]he burden on this points rests on the federal plaintiff to show 'that state procedural law barred presentation of [its] claims.'" *Penzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 14 (107 S. Ct. 1519, 1528, 95 L.Ed.2d 1 (1987) (quoting

Moore, 442 U.S. at 432, 99 S. Ct. at 2382). "[W]hen a litigant has not attempted to present his federal claims in related state-court proceedings, a federal court should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary." *Penzoil*, 481 U.S. at 15, 107 S. Ct. at 1528. In our view, Federal Express' assertion that its federal claims may be rendered moot without a stay fails to satisfy its burden of showing that state procedural law barred presentation of its claims.[6]

In *Watts v. Burkhart*, 854 F.2d 839, 847-48 (6th Cir. 1988), we held that judicial review under Tennessee's Uniform Administrative Procedures Act satisfies the third element of the *Younger* analysis because it provides sufficient opportunity to litigate constitutional claims. *See Ohio Civil Rights Comm'n v. Dayton Christian Schools*, 477 U.S. 619, 629, 106 S. Ct. 2718, 2724, 91 L.Ed.2d 512 (1986) ("[I]t is sufficient . . . that constitutional claims may be raised in state-court judicial review of the administrative proceeding.") On the basis of our ruling in *Watts*, and in the absence of contrary authority from Federal Express, we hold that Federal Express had an adequate opportunity to litigate the constitutional issues in the state court. Accordingly, all three elements of the *Younger* analysis are satisfied, and we hold that the district court did not err by abstaining from reaching the merits of this case.

III.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

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[6] We note that the Tennessee Court of Appeals denied Federal Express' request for a stay on condition that compliance with the TPSC's order would not prejudice judicial review of the order.

APPENDIX B

FEDERAL EXPRESS CORPORATION

v.

TENNESSEE PUBLIC SERVICE COMMISSION, et. al.

No. 3:87-0633.

United States District Court,
M.D. Tennessee,
Nashville Division.

April 23, 1990.

Carrier brought action under the Federal Declaratory Judgment Act for declaration that Tennessee Motor Carrier Act was expressly preempted by the Airline Deregulation Act and impliedly preempted by the commerce clause. The District Court, 693 F. Supp. 598, held that it lacked subject matter jurisdiction over the action. On appeal, the Court of Appeals, 878 F.2d 381, (unpublished opinion), affirmed. On petition for rehearing, the Court of Appeals reversed and remanded. On remand, the District Court, Wiseman, Chief Judge, held that: (1) abstention under *Younger* by federal court was appropriate, and (2) state had not waived abstention argument.

Dismissed.

William R. Willis, Jr., Marian F. Harrison, Willis & Knight, and Jeffrey Rappuhn, Nashville, Tenn., for plaintiff.

Deputy Gen. Counsel, Henry Walker, Tennessee Public Service Com'n, Nashville, Tenn., for defendants.

Val Sanford, Gullet, Sanford, Robinson & Martin, Nashville, Tenn., and Peter A. Greene, Thompson, Hine & Flory, Washington, D. C., for purolator.

MEMORANDUM

WISEMAN, Chief Judge,

This matter is before the Court on remand from the Sixth Circuit Court of Appeals. The Sixth Circuit reversed this court's holding that it did not have subject matter jurisdiction to determine the merits of Federal Express' claim. *See Federal Express Corp. v. Tennessee Public Service Comm'n*, 693 F. Supp. 598 (M.D.Tenn. 1988), *aff'd* 878 F.2d 381 (6th Cir. 1989)(table), *rev'd on petition for rehearing*, No. 88-5974, Slip op. (6th Cir. 10/6/89). In remanding, the Sixth Circuit instructed this court to consider the question of abstention in view of *CSXT, Inc. v. Pitz*, 883 F.2d 468 (6th Cir. 1989).

CSXT held that traditional abstention analysis applies even where preemption is the primary constitutional question. 883 F.2d at 473. *See also New Orleans*, __ U.S. __, 109 S.Ct. 2506, 105 L.Ed.2d 298, *reversing* 798 F.2d 858 (5th Cir. 1986)(rejecting argument that presence of preemption question bars District Court from abstaining under *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L.Ed.2d 669 (1971)). Traditional analysis of whether Younger abstention is appropriate follows a three-step framework.

> [Abstention] is appropriate only where a court can answer all three of the following questions in the affirmative:
>
> > [F]irst, do [the relevant state proceedings] . . . constitute an ongoing state judicial proceeding; second, do the proceedings implicate important state interests; and third, is there an adequate opportunity in the state proceedings to raise constitutional challenges.
>
> *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432, 102 S. Ct. 2515, 2521, 73 L.Ed.2d 116 (1982).

CSXT, 883 F.2d at 474 (parallel citations omitted; brackets supplied in *CSXT*).

Federal Express' dispute with defendant, Tennessee Public Service Commission (TPSC), has had a lengthy sojourn in the state administrative process, resulting in TPSC issuing a Show Cause Order on June 9, 1987.[1] The Show Cause Order rejected Federal Express' challenges to the applicability and constitutionality of a state requirement that all intrastate motor carriers apply for a certificate of convenience and necessity, and affirmed an ALJ's decision that Federal Express was an intrastate motor carrier under Tennessee law and was required to obtain a certificate. The TPSC gave Federal Express thirty days to comply with its order, but later extended the deadline to August 25, 1987. Federal Express subsequently filed a petition for review and an application for a certificate pending state review of the order. The Court of Appeals denied the stay on August 6, 1987.

Federal Express filed its federal complaint on August 7, alleging, as it did in the state administrative proceedings, that the state regulations were expressly preempted by the Airline Deregulation Act of 1978 and impliedly preempted by the Commerce Clause. On August 12, Federal Express moved for entry of a preliminary injunction without further hearing or for delineation of the issues to be presented at the hearing. On August 18, defendant moved to consolidate the preliminary injunction hearing with a hearing on the merits. Two days later, this court consolidated the injunction hearing with the hearing on the merits, extended the TRO to September 10, 1987, the date set for the consolidated hearing, and invited the parties to brief the issue of whether abstention was appropriate. On September 9, the day

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[1] The facts underlying the dispute are set forth fully in this court's opinion on plaintiff's motion to reconsider dismissal for lack of subject-matter jurisdiction. *See* 693 F. Supp. at 600-03.

before the consolidated hearing, Federal Express dismissed its state appeal.

After hearing the matter on September 10 and 11, the Court granted the preliminary injunction for an indefinite period, took the decision on the merits under advisement, and requested additional briefs on the issue of abstention. Although the abstention issued was argued squarely in the hearing and in the pre- and post-trial briefs, the Court did not reach the issue because it found the prerequisite to abstention, subject-matter jurisdiction, lacking. The Sixth Circuit reversed that holding, however, compelling this court now to address the abstention issue.

Applying the traditional, three-step framework with sensitivity to the federalism concerns underlying *Younger* abstention, the Court finds that it must abstain from determining the merits of this dispute. Consequently, the Court dismisses plaintiff's claim and lifts the injunction against TPSC.

I. THE STATE PROCEEDINGS CONSTITUTE AN "ONGOING JUDICIAL PROCEEDING".

Where the state proceeding "investigates, declares and enforces liabilities as they stand on present and past facts and under laws supposed already to exist," it is judicial. *NOPSI*, __ U.S. at __, 109 S. Ct. at 2519, 105 L.Ed.2d at 318 (quoting *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226, 29 S. Ct. 67, 69, 53 L.Ed. 150 (1908)). *Accord CSXT*, 883 F. 2d at 474. Both Federal Express and TPSC, agree, as they must, that the proceedings out of which this suit grew are "judicial," as defined in *NOPSI*. The more difficult issue is whether the proceedings are "ongoing" given that plaintiff has dismissed its state appeal.

As a general rule, the proper point of reference for determining whether state proceedings are "ongoing" is the date the federal complaint is filed. In *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1,

107 S.Ct. 1519, 95 L.Ed.2d 1 (1987), the Court applied the day-of-filing rule and held that abstention was appropriate, even though the state proceedings had run their course by the time the matter reached the Supreme Court and dismissal would leave Texaco without any state remedy. 481 U.S. at 17-18, 107 S. Ct. at 1529-30. Similarly, in *Zalman v. Armstrong*, 802 F. 2d 199 (6th Cir.1986), the court held that "the proper time reference for determining that applicability of Younger abstention is the time the federal complaint is filed." *Id.* at 204. The court vacated the District Court's judgment in favor of the federal plaintiff, even though the state criminal proceedings against him had been dismissed before the appeal was filed. *Id.* at 206-07. *See also Huffman v. Pursue, Ltd.*, 420 U.S. 592, 95 S. Ct. 1200, 43 L.Ed.2d 482 (1975) (rejecting argument that state judicial proceedings had ended by time federal complaint was filed); *Steffel v. Thompson*, 415 U.S. 452, 462, 94 S. Ct. 1209, 1217, 39 L.Ed.2d 505 (1974) (holding that Younger principles did not apply where no state criminal proceeding is pending when federal complaint is filed); *Thomas v. Texas State Bd. of Medical Exam.*, 807 F. 2d 453 (5th Cir. 1987) (abstention not appropriate where plaintiff voluntarily dismisses state claim before filing federal suit).

Federal Express argues that insisting upon the day-of-filing rule in this case is merely a rote argument because the federalism concerns underlying *Younger* no longer applied after the state appeal was dismissed. Federal Express is correct in arguing that courts must apply the three-step framework with sensitivity to the concerns that animate the *Younger* rule. *See Zalman*, 802 F.2d at 202. But contrary to Federal Express' argument, applying the day-of-filing rule to this case properly balances those concerns.

The *Younger* line of authority is concerned primarily with respecting the sovereignty, integrity, and competence of state systems, and with allowing the state systems to operate without undue interference from the federal government. *See, e.g.,,*

Younger, 401 U.S. at 44, 91 S. Ct. at 750; *Huffman,* 420 U.S. at 601-04, 95 S. Ct. at 1206-08. This line of authority admonishes federal courts to refrain from intruding into the state process in a manner that "reflect[s] negatively upon the state court's ability to enforce constitutional principles." *Cf. Huffman,* 420 U.S. at 604, 95 S. Ct. at 1208; *Steffel,* 415 U.S. at 462, 94 S. Ct. at 1217. In determining whether particular actions improperly interfere with the state process, the Supreme Court has not distinguished between courts' decisions to issue injunctions against the state and litigants' decisions to forego available state remedies. For example, in *Huffman,* the Court held that proceedings are "on-going" and, absent exceptional circumstances, courts must abstain where a losing state litigant has failed to exhaust his state appellate remedies. 420 U.S. at 608-10, 95 S. Ct. at 1210-11. As explained in *NOPSI,*

> For Younger purposes, the state's trial-and-appeals process is treated as a unitary system, and for a federal court to disrupt its integrity by intervening in mid-process would demonstrate a lack of respect for the State as sovereign. **For the same reason, a party may not procure federal intervention by terminating the state judicial process prematurely-foregoing the state appeal to attack the trial court's judgment in federal court.** '[A] necessary concomitant of Younger is that a party [wishing to contest in federal court the judgment of a state judicial tribunal] must exhaust his state appellate remedies before seeking relief in the District Court.' *Huffman,* 420 U.S. at 608 [95 S. Ct. at 1210].

__U.S. at __, 109 S. Ct. at 2518, 105 L.Ed.2d at 317 (emphasis supplied).

Given the system of judicial review of administrative proceedings established in Tennessee's Uniform Administrative Procedures Act, Tenn.Code. Ann. §§ 4-5-101 through 324, this

court finds no principled basis, for *Younger* purposes, to distinguish Tennessee's administrative proceeding-and-judicial review process from the state judicial systems contemplated in *Huffman* and *NOPSI*. Cf. __ U.S. __, 109 S. Ct. at 2518-19n. 5, 105 L.Ed.2d at 318 n. 4 (suggesting but not deciding that litigants who fail to exhaust their state judicial remedies may not challenge a state administrative finding in federal court). Both are entitled to the same respect from federal courts. Further, as the Supreme Court has intimated, whether federal litigations results in an injunction, or prompts litigants to short circuit the state process to move to a federal forum even though the litigants and the state have devoted resources to processing or adjudicating the claims, the integrity of the state system is disrupted. Thus, rather than mitigating the federalism concerns underlying *Younger*, plaintiff's voluntary dismissal of its state appeal on the eve of the hearing on the merits disrupts the state process and manifests disrespect for the state system's competence in precisely the manner that Younger and its progeny prohibit.

Another purpose of deferring to the state process is to provide the opportunity for narrowing constructions that might obviate constitutional problems and to avoid issuing advisory decisions based upon interpretations of state law that turn out not to be binding on the state courts. *See Pennzoil*, 481 U.S. at 11-12, 107 S. Ct. at 1526-27.[2] Permitting a plaintiff to cut off his state appeal

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[2] This concern is typically associated with abstention under *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 61 S. Ct. 643, 85 L.Ed. 971 (1941), rather than *Younger*. But, as the Supreme Court has stated, "The various types of abstention are not rigid pigeonholes into which federal courts must try to fit cases. Rather, they reflect a complex of considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes." *Pennzoil*, 481 U.S. at 11 n. 9, 107 S. Ct. at 1526 n. 9. The concern that federal courts not act based upon non-binding interpretations of state law is but one of a complex of considerations that, under these circumstances, is relevant to determining whether abstention under *Younger* is appropriate.

in order to have a federal court hear his claim frustrates this concern.

Thirdly, *Younger* abstention has been crafted to avoid duplicative litigation and waste of judicial resources. *E.g., Younger,* 401 U.S. at 44, 91 S.Ct. at 750; *Steffel,* 415 U.S. at 462, 94 S. Ct. at 1217. Permitting a plaintiff to initiate the federal process while state proceedings are ongoing encourages undue forum shopping based upon last minute assessments of the federal and state proceedings, and frustrates this concern for judicial economy. Furthermore, if the state proceedings turn on questions of federal law, plaintiff may ultimately appeal to the United States Supreme Court. Thus, requiring a plaintiff under the circumstances presented to remain in state court preserves both judicial resources and plaintiff's right to present federal claims in a federal forum.

Therefore, the Court holds that the day-of-filing rule is both supported in the case law and appropriate in these circumstances. Applying that rule, the Court finds that the underlying state proceedings are "ongoing" for purposes of *Younger*. Therefore, the first step of the *Younger* analysis is satisfied.

II. REGULATING THE INTRASTATE TRUCKING INDUSTRY IS AN "IMPORTANT STATE INTEREST."

The importance of the state interest is not mitigated because of a potential preemption problem. *E.g., CSXT*, 883 F. 2d at 475. The importance of the generic proceedings to the state, not the outcome of a particular case, is what matters. *NOPSI*, __ U.S. __, 109 S. Ct. at 2516, 105 L.Ed.2d at 315. This circuit has applied Younger to such "important state interests" as the regulation of doctors, insurance companies, dentists, electric utilities, and railroads. *See Watts v. Burkhart,* 854 F. 2d 839 (6th Cir. 1988); *Blue Cross and Blue Shield of Michigan v. Baerwaldt,* 726 F. 2d 296 (6th Cir. 1984); *Parker v. Commonwealth of Ky. Bd. of Dentistry*, 818 F. 2d 504 (6th Cir. 1987); *American Electric*

Power Co. v. Kentucky Public Service Comm'n, 787 F. 2d 468. Tennessee's interest in regulating intrastate trucking is no less important, and satisfies this prong of the *Younger* analysis.

III. FEDERAL EXPRESS HAD AN ADEQUATE OPPORTUNITY TO RAISE ITS CONSTITUTIONAL CONCERNS IN THE STATE PROCEEDINGS.

Federal Express argues that the Court of Appeals' refusal to grant a stay of the licensing process threatened full judicial consideration of the statutory and constitutional issues. It does not claim that it did not have an opportunity to present its arguments. Rather, Federal Express contends that it could not have had a meaningful hearing before it would have had either to comply or to stop its trucks. This argument misses the point of the "meaningful opportunity" requirement.

In *Pennzoil*, Texaco argued that abstention was inappropriate because no Texas court could have heard Texaco's constitutional arguments within the limited time available to Texaco. The Court rejected the argument, holding that the burden rests upon Texaco "to show that 'state procedural law barred presentation of [its] claims.' " 481 U.S. at 14, 107 S.Ct. at 1528 (quoting *Moore v. Sims*, 442 U.S. 415, 432, 99 S. Ct. 2371, 2381-82, 60 L.Ed.2d 994 (197900. Thus, the pertinent issue is whether Federal Express' constitutional claims could have been raised in the pending state proceedings, not whether a decision would have been rendered in a timely manner. See Moore, 442 U.S. at 425, 99 S. Ct. at 2378 ("The pertinent issue is whether appellees' constitutional claims could have been raised in the state proceedings.") & at 430 n. 12, 99 S. Ct. at 2381 n. 12 ("[A]ppellees had an opportunity to present their federal claims in the state proceedings. No more is required to invoke *Younger* abstention.")

The Sixth Circuit has held that judicial review under Tennessee's Uniform Administrative Procedures Act provides

sufficient opportunity to litigate constitutional claims. *Watts v. Burkhart*, 854 F. 2d 839, 847 (6th Cir. 1988) (statute governing scope of review of expressly contemplates that a petitioner will be afforded the opportunity to raise constitutional issues). *Cf. CSXT*, 883 F. 2d at 473 (Merritt, J.) (specifically commending Tennessee Court of Appeals for analysis and decision on a preemption claim).

Thus, under *Pennzoil*, Federal Express's claim that the state court could not have heard the constitutional issue in time misses the mark and begs a demonstration that state procedures denied it the opportunity to litigate the constitutional issue. Under *Watts*, however, Federal Express cannot meet that burden. Therefore, this prong of the traditional abstention analysis has also been satisfied.

IV. TPSC HAS NOT WAIVED THE ABSTENTION ARGUMENT.

Although the analysis above supports *Younger* abstention, it would nevertheless be appropriate to decide the merits of plaintiff's claims if TPSC has waived the abstention argument. Abstention can be waived because "if the state voluntarily chooses to submit to a federal forum, principles of comity do not demand that the Federal court force the case back to the State's own system." *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 479-80, 97 S. Ct. 1898, 1904, 52 L.Ed.2d 513 (1977). But mere failure to raise the abstention issue is not sufficient to waive it. *See Sosna v. Iowa*, 419 U.S. 393, 396, 95 S.Ct. 553, 555-56, 42 L.Ed.2d 532 (1975) (Supreme Court first to raise abstention issue); *CSXT*, 883 F.2d at 471 (abstention first raised by defendant-intervenor); *Louisiana Power & Light v. Thibodaux*, 360 U.S. 25, 79 S. Ct. 1070, 3 L.Ed.2d 1058 (1959)(district court has right to raise abstention issue sua sponte). *But see City of Paducah v. Investment Entertainment, Inc.*, 791 F. 2d 463, 471 (6th Cir. 1986) (Wellford, J.,

concurring)(city's failure to actively pursue abstention issue even after raising the issue in its answer amounts to waiver). To waive abstention, the State must voluntarily submit to federal jurisdiction and expressly urge the court to proceed to an adjudication of the merits. *Ohio Civil Rights Comm'n v. Dayton Christian Schools*, 477 U.S. 619, 626, 106 S. Ct. 2718, 2722, 91 L.Ed.2d 512 (1986). *Cf. Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union Local 54*, 468 U.S. 491, 500 n. 9, 104 S. Ct. 3179, 3184 n. 9, 82 L.Ed.2d 373 (1984).

In this case, the state did not voluntarily submit to federal jurisdiction and urge this court to proceed to an adjudication of the merits. The state did move to consolidate the motion for a preliminary injunction with a hearing on the merits, but in its papers and through the hearing, the state continued to raise the abstention question and vehemently argued that this court did not have subject-matter jurisdiction over the dispute. TPSC's counsel did state in closing arguments that "abstention was no longer an issue" because Federal Express had dismissed its state appeal. But counsel expressly retracted the statement in the post-hearing brief and has continued to assert the abstention issue throughout this litigation. In short, TPSC has not waived the abstention argument.

CONCLUSION

For the reasons stated above, the Court finds that abstention under *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L.Ed.2d 669 (1971), is appropriate. Plaintiff's claim is dismissed and the injunction against defendant, TPSC, is lifted.

APPENDIX C

FEDERAL EXPRESS CORPORATION

v.

TENNESSEE PUBLIC SERVICE COMMISSION, et. al.

No. 3-87-0633.

United States District Court,
M.D. Tennessee,
Nashville Division.

June 16, 1988.

On Motion to Reconsider Aug. 17, 1988.

Air carrier brought action under the Federal Declaratory Judgment Act for declaration that the Tennessee Motor Carrier Act was expressly preempted by the Airline Deregulation Act and impliedly preempted by the commerce clause. The District Court, Wiseman, Chief Judge, held that district court lacked subject matter jurisdiction over a declaratory judgment action which was brought primarily as a response to threatened state action in which federal preemption was raised as a defense. On defendant's motion to reconsider, the Court held that subject matter jurisdiction preceded ripeness and thus federal District Court could not hear case without subject matter jurisdiction.

Dismissed and motion to reconsider denied.

William R. Willis, Jr., Marian F. Harrison, Willis & Knight, Nashville, Tenn., Jeffrey Rappuhn, for plaintiff.

Donald L. Scholes, Deputy Gen. Counsel, Henry Walker, Tenn., Public Service Com'n, Nashville, Tenn., for defendants.

Val Sanford, Gullett, Sanford, Robinson & Martin, Nashville, Tenn., Peter A. Greene, Thompson, Hine & FLory, Washington, D.C., for Purolator.

MEMORANDUM

WISEMAN, Chief Judge.

I.

Federal Express Corporation created the small package air express business in which it is an acknowledged world leader, transporting well over 700,000 packages every night.[1] Virtually every package is processed through the Federal Express system in the same way: it is picked up by a courier, taken to an airport, flown to one of Federal Express' airport hubs, sorted with other packages bound for the same location, and then transported away from the hub by air or truck to its ultimate destination. During this process, Federal Express tracks only the destination, not the origin, of each package. Packages from every conceivable location are initially taken to one location where they are then sorted by destination only. Approximately 90 percent of all packages transported by Federal Express are sorted at its Superhub in Memphis, Tennessee, the corporation's principle place of business. To make the system both economical and efficient, the same sorting procedure is followed for every package, even when its origin and destination are very near each other. Hence, a package sent by Federal Express from one floor of a Manhattan Skyscraper to another was first flown to Memphis and sorted

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[1] The facts set forth in this opinion are derived from explanations given by A. Doyle Cloud, Vice President of Legal and Regulatory Affairs at Federal Express, in his testimony at the hearing for a preliminary injunction and in an affidavit. See Transcript of Hearing at 30-113, *Federal Express Corp. v. Tennessee Public Service Comm'n*, (3:87-0633); Complaint, Exhibit G, Affidavit of A. Doyle Cloud.

with all the other packages to be transported that evening. To operate this system, Federal Express employs 56 Boeing 727's, 19 DC-10's, a specialized fleet of feeder aircraft, and a motor vehicle fleet exceeding 16,000 vehicles. Federal Express is a certified air carrier operating under the grant of an all cargo authority issued by the Federal Aviation Act of 1958. Federal Express is also licensed as a motor carrier under the Interstate Commerce Act as an entity that holds itself out to the general public to provide motor transportation for compensation. See 49 U.S.C. § 10102(14).

Of the more than 700,000 packages transported nightly, approximately 1000 have both an origin and destination in Tennessee. Many of these Tennessee parcels are transported in exactly the same way other parcels are distributed: trucks pick up the parcels and take them to nearby aircraft; they are flown to Memphis and sorted; they are flown back to new destinations and ultimately delivered to the recipient by truck. Some Tennessee packages picked up near the Memphis hub, however, with destinations that are also near the hub are never transported by air. A courier picks them up, takes them by truck to the hub for sorting alongside other packages destined for points across the globe, and after sorting, takes them by truck to their destination. Under Federal Express' current highly structured systems, it is impossible for the courier who picks up the packages initially to know which of them will travel by air alone, which by motor vehicle alone, and which by a combination of air and ground transport. Using calculations derived after the fact, Federal Express estimates that it transports approximately 500 packages per night by motor vehicle solely within the state of Tennessee. These packages comprise less than 6 percent of Federal Express' Tennessee volume and less than .01 percent of Federal Express' National Volume.

The Tennessee Motor Carrier Act defines a motor carrier as follows:

> "Motor carrier," when used in this chapter, means any person, firm, partnership, association, joint stock company, corporation, lessee, trustee, or receiver appointed by any court whatsoever, operating any motor vehicle with or without semitrailers attached, upon any public highway for the transportation of persons or property or both or for providing or furnishing such transportation service, for hire as a common carrier.

Tenn. Code. Ann. § 65-15-102(c). A motor carrier cannot operate as a common carrier between two points in Tennessee without first obtaining a certificate of convenience and necessity from the Tennessee Public Service Commission ("TPSC"). Tenn.CodeAnn. § 65-15-107. The TPSC has the power under Tennessee law to regulate motor carriers by approving rates, fares, charges, classifications, schedules, services, and modes of operation. Tenn.Code Ann. § 65-15-106. Federal Express has never obtained a certificate of convenience and necessity from the TPSC.

On July 2, 1986, the TPSC asked Federal Express to show cause why it was not subject to the Tennessee Motor Carriers Act.[2] Federal Express had a hearing before an Administrative Law Judge on July 23 and September 24 in which it argued against the TPSC's regulation of its operations. On February 24, 1987, the ALJ ruled that Federal Express was a motor carrier under Tennessee law and must apply for a certificate from the TPSC. TPSC reviewed the ALJ's order and heard oral argument from all the parties. After a review of the entire record, the TPSC affirmed the ALJ's decision and ordered Federal Express to apply for a certificate. On June 9, 1987, the TPSC issued a

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[2] For synopsis of the procedural history of this case before it reached this Court, *see* Complaint, Exhibit B, Show Cause Order against Federal Express Corporation.

twenty-five page Show Cause Order in which it set forth its findings of fact and conclusions of law. At the hearing Federal Express had argued, inter alia,[3] that section 105 of the Airline Deregulation Act of 1978, 49 U.S.C. App. § 1305, expressly preempted any state from regulating the rates, routes, or services of a certified air carrier like Federal Express and that the Act impliedly preempted state law because it frustrated Congressional intent, interfered with the uniform national system Congress had fostered, and burdened interstate commerce. The TPSC gave Federal Express 30 days to comply with its order, later extending that deadline to August 25, 1987. The Tennessee Motor Carrier Act provides for judicial review of TPSC orders through the Tennessee state courts. Tenn.Code Ann. § 65-15-120; § 4-5-322. Alternatively, the TPSC may sue for an injunction in the state's chancery courts to enforce its orders against noncompliant parties. Tenn.Code Ann. § 65-15-121.

Federal Express filed a petition for review and an application for immediate stay with the Tennessee Court of Appeals. The company sought to delay its application for a certificate of convenience and necessity pending review of the TPSC's order. The Tennessee Court of Appeals denied the stay on August 6. On August 7, Federal Express filed a complaint in this Court.

In its complaint, Federal Express sought declaratory and injunctive relief against the TPSC, arguing that the Tennessee Motor Carrier Act was expressly preempted by the Airline

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[3] Federal Express also made two arguments before the Public Service Commission that were not included in its federal complaint: that postal regulations suspending the private express statutes preempted state regulatory authority over intrastate ground transport by entities like Federal Express that operate under the suspension; and that intrastate surface transport of mail by Federal Express is business conducted for the United States government and exempt from state regulation under Tenn.Code Ann. § 65-15-105. *See* Complaint, Exhibit B at 5.

Deregulation Act and impliedly preempted by the Commerce Clause.[4] Plaintiff's motion for a temporary restraining order, forestalling application for the certificate, was granted on August 10. On September 11 and 12, this Court heard arguments on the motion for a preliminary injunction. Purolator Courier, a competitor with Federal Express that has complied with the Tennessee Motor Carrier Act, was permitted to intervene as a defendant. The hearing was consolidated with a bench trial on the merits. After the first day of trial in this Court, Federal Express voluntarily dismissed its appeal in state court, apparently hoping to undercut any possibility of abstention. The Court heard the testimony of two Federal Express executives[5] as well as oral argument for two days, granted the preliminary injunction for an indefinite period, and took the decision on the merits under advisement.[6] The Court also requested additional briefs on the issues of abstention and res judicata which were duly submitted. Careful review of the record reveals that the following issues are before the Court.

1. Does this Court have subject-matter jurisdiction over Federal Express' claims?

2. If so, should the Court nonetheless abstain from deciding those claims?

3. Assuming that the Court has the power to decide this case and chooses to exercise that power, what preclusive effect must be given to decisions by a state administrative agency, the TPSC, concerning

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[4] Complaint, *Federal Express Corp. v. Tennessee Public Service Comm'n*, (3:87-633). Federal Express also made its interstate commerce argument a subject of the preemption issue in its trial brief. *See* Trial Brief of Federal Express Corporation at 28-33.

[5] The Court heard testimony from A. Doyle Cloud and from Frederick Wallace Smith, founder and CEO of the Federal Express Corporation.

[6] *See* Transcript at 227-228; Clerk's Resume for September 11, 1987.

a. its own jurisdiction;

b. its findings of fact; and

c. its conclusions of law.

4. If the plaintiff is not barred from this Court on res judicata principles, what are the results on the merits?

a. Does the Airline Deregulation Act of 1978, 49 U.S.C.App. § 1305, expressly preempt the Tennessee Motor Carrier Act and therefore prohibit TPSC from regulating Federal Express' intrastate motor carriage?

b. Does the Act impliedly preempt operation of the state regulatory scheme because the legislative history urges a uniform national air carrier scheme and because state regulation would unduly burden Federal Express' interstate operations?

Because the Court determines that under *Public Service Commission v. Wycoff Co.*, 344 U.S. 237, 73 S. Ct. 236, 97 L.Ed. 291 (1952) and its progeny the Court has no subject matter jurisdiction, only the first issue need be addressed.

II.

This is not a diversity case. Federal Express' principle place of business is in Tennessee and the TPSC is a Tennessee state administrative agency. This Court only has subject matter jurisdiction if, as Federal Express acknowledged in its jurisdictional statement, the case presents a federal question.

To determine whether the case arises under federal law, the well-pleaded complaint rule requires the court to examine the plaintiff's complaint, not to anticipate federal defenses. So for example, a federal court has no subject matter jurisdiction over

a case in which the plaintiff states a claim under state law and the defendant responds by raising a defense under federal law. *See Franchise Tax Bd.. v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 10-11, 103 S. Ct. 2841, 2846-47, 77 L.Ed.2d 420, 430-31 (1983). According to the Holmes test, set forth in *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260, 36 S. Ct. 585, 60 L.Ed. 987 (1916), in the vast majority of cases, a claim arises under the law that creates the cause of action. *See id.* 463 U.S. at 8-9, 103 S. Ct. at 2845-46.

In its jurisdictional statement, Federal Express seeks a declaratory judgment under 28 U.S.C. § 2201 and asserts federal question jurisdiction under 28 U.S.C. §§ 1331 and 1337.[7] Federal Express' claims are said to arise under both a federal statute and the Constitution. The Airline Deregulation Act of 1978, 49 U.S.C. App. § 1305(a) is entitled "Federal Preemption." It forbids any state to regulate the rates, routes, or services of a certified air carrier. This statute in combination with the Supremacy Clause, U.S. Const., art. VI, cl. 2, supports the express

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[7] It is axiomatic that the Constitutional requirements in Art. III § 2 that a case "arise under" federal law is broader than the requirement couched in almost identical language in 28 U.S.C. § 1331. The Supreme court has observed that it makes no such distinction between 28 U.S.C. § 1331 and 28 U.S.C. § 1337, however. *See Franchise Tax Bd. v. Laborers Vacation Trust*, 463 U.S. 1, 8, n. 7, 103 S. Ct. 2841, 2845, n. 7, 77 L.Ed.2d, 430 n. 7 (1983).

Section 1331 reads as follows:

> Federal Question. The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treatises of the United States.

Section 1337(a) reads in relevant part as follows:

> Commerce and antitrust regulations. The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce. . . .

preemption prong of Federal Express' case. 49 U.S.C.App. § 1302(b) addresses policies underlying the Airline Deregulation Act, including the encouragement of an expedited all-cargo air service system responsive to the needs of shippers, United States' commerce, and the national defense. This portion of the Act in conjunction with the Commerce Clause, U.S. Const., art I, § 8, cl. 3 sets forth the implied preemption prong of Federal Express' case. Under the well-pleaded complaint rule and the Holmes test, a cursory review of plaintiff's complaint would appear to satisfy the mandates of 28 U.S.C. §§ 1331 and 1337 that the case "arise under" federal law.

This in not the usual case, however. It is an action for declaratory and injunctive relief. The unusual character of the declaratory judgment action is the lynchpin on which this decision turns.

Declaratory judgments are peculiar causes of action for several reasons. When the Federal Declaratory Judgment Act, 28 U.S.C. § 2201, was first passed, Congress was concerned that the Act could unduly expand the subject-matter jurisdiction of the federal courts since a litigant seeking any declaration of rights and liabilities could point to the Act as creating a claim "arising under" a federal statute. Accordingly, the courts determined that merely seeking a declaratory judgment under the new statute could not alone create subject-matter jurisdiction. The litigant must allege an independent basis for the court's power to act apart from section 2201. *See Franchise Tax*, 463 U.S. at 15-19, 103 S. Ct. at 2849-51; *Annotation, Federal Question Jurisdiction in Declaratory Judgment Suit Challenging State Statute or Regulation on Grounds of Federal Preemption*, 69 A.L.R.Fed. 753, 757 (1984). Another oddity of the action for a declaratory judgment is that it often reverses the roles of the parties. A plaintiff in a declaratory judgment action frequently seeks to avoid being sued by having a court issue a preliminary determination of its rights. The declaratory plaintiff would have been

a defendant if the previously threatened suit had occurred. *See Franchise Tax* at 16, n. 14, 103 S. Ct. at 2850 n. 14, 69 A.L.R.Fed. at 757. Hence, the rule developed that if but for the availability of a declaratory judgment the declaratory plaintiff's claim would have arisen only as a defense to a cause of action brought by the declaratory defendant under state law, no subject-matter jurisdiction exists. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 70 S. Ct. 876, 94 L.Ed. 1194 (1950).

This rule has frequently been applied when the declaratory plaintiff asserts federal preemption as the basis for the court's subject-matter jurisdiction. At least three circuits, including the Sixth Circuit, have uniformly agreed that there is no federal subject-matter jurisdiction when federal preemption is raised as a defense to a threatened state action. *See Michigan Sav. & Loan League v. Francis*, 683 F.2d 957, 962 (6th Cir. 1982).[8]

The rule has its origin in an old Supreme Court case, *Public Service Comm'n v. Wycoff Co.*, 344 U.S. 237, 73 S Ct. 236, 97 L.Ed. 291 (1952), surprisingly similar in its facts to the case before the Court. Wycoff transported films and newsreels throughout the United States, including transport between points in Utah. The Utah PSC filed suit in state court to prevent Wycoff from continuing its intrastate commerce absent the PSC's regulation. Wycoff sought declaratory and injunctive relief in federal court. Hence, Wycoff was the defendant in the PSC's state court suit and the plaintiff in the declaratory judgment action. Wycoff argued that its intrastate operations were so integral to its interstate carriage that the district court should declare all of the Utah shipments were essentially interstate commerce, beyond the scope of the PSC's regulatory hand. *See*

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[8] *Accord, Madsen v. Prudential Federal Sav. and Loan Assoc.*, 635 F.2d 797 (10th Cir. 1980), *cert. denied*, 451 U.S. 1018, 101 S. Ct. 3007, 69 L.Ed.2d 389 (1981); *First Nat'l Bank of Aberdeen v. Aberdeen Nat'l Bank*, 627 F.2d 843 (8th Cir. 1980).

id. at 239, 73 S. Ct. at 238. Wycoff also sought to enjoin PSC from interfering with its in-state transport, arguing that the PSC's attempt to halt the in-state-shipments was a burden on interstate commerce. *See id.*

The Supreme Court determined that Wycoff warranted neither an injunction nor a declaratory judgment because no justiciable controversy had yet been presented. Wycoff had not asked the court to determine that the PSC was without power to enter a specific order or take any concrete step; rather, both remedies sought to guard against the possibility that the PSC would attempt to prevent the intrastate shipments. *Id.* at 244, 73 S. Ct. at 240 (emphasis omitted). Wycoff was really using the Declaratory Judgment Act as a means to ward off the PSC's attempts to regulate it. In oft-cited dicta, the Court observed:

> In this case, as in many actions for declaratory judgment, the realistic position of the parties is reversed. The plaintiff is seeking to establish a defense against a cause of action which the declaratory defendant may assert in the Utah courts. Respondent here has sought to ward off possible action of the petitioners by seeking a declaratory judgment to the effect that he will have a good defense when and if that cause of action is asserted. *Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court.* If the cause of action, which the declaratory defendant threatens to assert, does not itself involve a claim under federal law, it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim. This is dubious *even though the declaratory complaint sets forth a claim of federal right, if that right is in reality in the nature of a defense to a threatened cause of action.* Federal courts will not seize litigations from state courts merely

> because one, normally a defendant, goes to federal court to begin his federal-law defense before the state court begins the case under state law.

Id. at 248, 73 S. Ct. at 242 (citations omitted) (emphasis added). The Court added that it disapproved anticipatory declarations as to state regulatory statutes, even when rendered by state courts. *Id.* at 247, 73 S. Ct. at 242. State administrative bodies have the initial responsibility for making factual findings and issuing orders regarding state regulatory schemes; state courts have "the first and last word" about the meaning of state statutes. *Id.* Given this framework and the ample opportunity for judicial review of administrative decisions by the state courts and the Supreme Court, anticipatory declarations by a federal district court were viewed with even more distaste. *Id.*

The Sixth Circuit has adopted the approach of two other circuits in applying the *Wycoff* analysis to declaratory judgments in which preemption is said to be an independent basis for subject-matter jurisdiction. In *Michigan Sav. & Loan League v. Francis*, 683 F.2d 957 (6th Cir. 1982), the issue was whether federally chartered savings and loan associations in Michigan had to conform to the Michigan Mortgage Lending practices Act or whether the Home Owners Loan Act of 1933, a federal statute, preempted state law. Francis, Commissioner of the Michigan Financial Institutions Bureau, sent written notice to the savings and loans and warned them that they would be fined for failure to comply with the state statutory scheme. The savings and loans filed suit in federal court for a declaratory judgment that they were exempt from the state law and for an injunction preventing the Commissioner from regulating them under the state statutory scheme. The savings and loans argued that the federal act preempted state law and that compliance with both federal and state law would be impermissibly burdensome. *Id.* at 958-059.

The district court dismissed the case for lack of subject-matter jurisdiction, and the Sixth Circuit affirmed, quoting the lower court with approval.

> The actual controversy involved here is the application of a state statute and state regulations to the plaintiff associations. There is no controversy over the applicability of the federal regulations. Federal law arises in this case only as a preemption defense raised by the plaintiffs to the enforcement of the Act, which is the real controversy.

Id. at 960 (citation omitted). After a discussion of what it called the "*Wycoff* preemption problem," the Sixth Circuit adopted the rule that there is no federal jurisdiction where federal preemption is raised as a defense to a threatened state action. *Id.* at 962.

Shortly thereafter the Sixth Circuit reaffirmed the rule in *First Fed. Sav. & Loan Assoc. v. Detroit Bond & Mortgage Investment Co.*, 687 F.2d 143 (6th Cir. 1982). The issue in this case was whether federally chartered savings and loans had to comply with a state law making due-on sale clauses unenforceable. Again, the savings and loans sought a declaratory judgment that federal regulations preempted state law. Again the court affirmed the district court's dismissal of the claims for lack of subject-matter jurisdiction. The court observed that a recent Supreme Court decision revealed that the savings and loans were correct in asserting that federal lending laws preempted the state law at issue. But because the jurisdictional issue precluded consideration of the merits, dismissal was nonetheless appropriate. *Id.* at 145.

Another district court in our circuit has addressed the *Wycoff* preemption question as well. In *Michigan United Food and Comm. Wkrs. Unions v. Baerwaldt*, 572 F.Supp. 943 (E.D.Mich. 1983), rev'd 767 F.2d 308 (6th Cir. 1985), *cert. den.*, 474 U.S. 1059, 106 S.Ct. 801, 88 L.Ed.2d 777 (1986), the plaintiffs were

health and welfare benefit trust funds subject to ERISA[9] and insured by the Occidental Life Insurance Company. An amendment to the Michigan Insurance Code required that group disability insurance policies include a certain coverage for substance abuse; ERISA did not require this. Although the state took no action against the trusts or their insurer, the trusts sought declaratory and injunctive relief and argued that ERISA preempted application of the state law. *Id.* at 945. The trusts also argued that the state law was preempted by the National Labor Relations Act ("NLRA") because it interfered with bargaining between unions and their employers.

The district court rejected application of the *Wycoff* preemption doctrine for several reasons. No state action had been threatened to spur the declaratory plaintiffs into federal court. *Id.* at 946. Even if it had, the court observed, the insurance company, not the trusts, would have been the defendant in the state court suit. Hence, this case did not exhibit the kind of role reversal common to *Wycoff* and its progeny. Unlike other cases in which the Home Owners Loan Act had been at issue, ERISA had express language of preemption which the court found to be controlling.[10] Finally ERISA itself provided an independent

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[9] The Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.*

[10] *Id.* This part of the analysis is jarring in light of the Sixth Circuit's approach in *First Fed. Savings & Loan Asoc. v. Detroit Bond & Mortgage Investment Co.*, 687 F.2d 143 (6th Cir. 1982). In that case, the Sixth Circuit observed that a recent Supreme Court decision approving the declaratory plaintiff's preemption argument was not dispositive because the merits could not be reached before the jurisdictional issue. By making the "express language of preemption" in ERISA a factor in the *Wycoff* analysis, the district court seeks to put the cart before the horse. In any event, the Sixth Circuit reversed the trial court's preemption decisions.

alternative basis for jurisdiction in setting forth a cause of action for the trusts.[11] The district court found that the Michigan statute was preempted both by ERISA and the NLRA. The Sixth Circuit reversed the trial court on the preemption issues but did not address its *Wycoff* analysis. *See* 767 F.2d 308.

III.

The case before this Court is startlingly similar to those in which both the Supreme Court and the Sixth Circuit have said no subject-matter jurisdiction should exist.

In each instance, a state administrative agency took some action against the declaratory plaintiff and ordered it to comply with a state regulatory scheme. The Utah PSC had already filed suit in state court when the Wycoff Company brought its federal court suit; in Michigan Sav. & Loan, Michigan's Commissioner of Financial Institutions had ordered federally chartered savings and loans to comply with state law or face a fine. In our case, the TPSC has ordered Federal Express to apply for a certificate of convenience and necessity. Failure to apply in a timely way could prompt the TPSC to bring an action in chancery court to enforce its order.[12] *See* Tenn.Code Ann. § 65-15-121.

Federal Express could have appealed the TPSC's order to the Tennessee Court of Appeals. Instead, like other declaratory plaintiffs in *Wycoff* preemption cases, Federal Express sought to avoid state regulation of its intrastate ground carriage by changing its role as defendant in the administrative action to that of plaintiff in this Court. The arguments made by Federal Express

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[11] *See* 29 U.S.C. § 1132(a)(3), (f).

[12] Because the preliminary injunction has been continued until the Court reaches a decision, Federal Express' continuing failure to apply for a certificate is not yet untimely.

are like those of other declaratory plaintiffs who have asked for declaratory and injunctive relief against a state agency trying to regulate them. In *Wycoff*, the plaintiff said that its intrastate shipments should be characterized as interstate commerce and that regulation would burden interstate commerce. In *Michigan Sav. and Loan*, the declaratory plaintiff argued that federal law preempted the state statute and that compliance was unduly burdensome. In its complaint and in its arguments before this Court, the plaintiff argued that application of the Tennessee Motor Carrier Act was expressly preempted by the Airline Deregulation Act and impliedly preempted by the potential burden on interstate commerce posed by the TPSC's regulation.

The character of the threatened action by the TPSC is its attempt to enforce its existing order that Federal Express comply with the Tennessee Motor Carrier's Act by applying for a certificate of convenience and necessity, thus permitting the TPSC to regulate it. The defendants take an inconsistent position on this point, arguing that the threat has already passed because the administrative hearing is over and that no threat exists until particular regulations concerning Federal Express have been issued.[13] These positions are both inconsistent and overly formalistic. The analysis of the Sixth Circuit in *Michigan Sav. and Loan* is more to the point. There is no question about whether the Airline Deregulation Act applies to Federal Express. No one suggests that Federal Express is not a certified air carrier. The real issue in this case is whether the regulatory scheme set forth in the Tennessee Motor Carrier Act can be applied to Federal Express. If the procedural posture of the parties was

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[13] *Compare* Supplemental Brief of the Tennessee Public Service Commission on Abstention and Res Judicata at 14, n. 21 (the state action has already occurred) *with* Supplemental Brief of Purolator Courier Corp. as to Res Judicata and Abstention Issues at 23-25, Appendix A (burdens on Federal Express are hypothetical).

reversed and the TPSC sought a declaration of its rights under state law, Federal Express' arguments would arise only as a defense to the state law issue. This is not enough to create subject-matter jurisdiction.

This result is satisfactory for two other reasons. Even assuming that Federal Express' interstate commerce claim was neither an intrinsic part of its preemption argument nor that it arose solely as a defense to a state law claim, there would remain a real question as to whether that single issue would be ripe for the Court to decide. The Supreme Court dismissed Wycoff's claim precisely because the declaratory plaintiff was seeking to avoid the bare possibility that it might be regulated in a burdensome way. If a particular regulation imposed by the TPSC does result in a burden on interstate commerce, that question can be resolved when it arises. Further, this result comports with the deference entitled to state administrative decisions and state court review emphasized in *Wycoff*. Essentially, Federal Express is substituting this Court for a carefully devised avenue of appeal through the Tennessee Court of Appeals, the Tennessee Supreme Court, and the U.S. Supreme Court. *Wycoff* makes clear that state courts are bound equally with federal courts by the Federal Constitution and laws. See 344 U.S. at 248, 73 S. Ct. at 242. For this Court to encourage the maneuver employed by Federal Express in this case would undercut important principles of federalism.

Accordingly, the case is dismissed for lack of subject-matter jurisdiction. The preliminary injunction is dissolved.

ON MOTION TO RECONSIDER

I.

In its June 16, 1988 Memorandum and Order, this Court held that it has no subject matter jurisdiction over the issues in this lawsuit under the Sixth Circuit's rule in *Michigan Sav. & Loan League v. Francis*, 683 F.2d 957 (6th Cir. 1982). The Sixth Circuit in that case analyzed the Supreme Court's discussion in

Public Service Commission v. Wycoff Co., 344 U.S. 237, 73 S. Ct. 236, 97 L.Ed. 291 (1952) and explicitly held that there is no federal jurisdiction where federal preemption is raised as a defense to a threatened state action. 683 F. 2d at 962. The facts of the case before the Court have been set forth in its June 16 Memorandum[1] and will not be repeated in their entirety here. In an administrative action, the Tennessee Public Service Commission [TPSC] has determined that Federal Express Corporation engages in intrastate motor carriage and is therefore subject to regulation as a motor carrier under the Tennessee Motor Carriers Act, Tenn.Code Ann. § 65-15-101, et seq. Federal Express had unsuccessfully argued to the TPSC that the Airline Deregulation Act of 1978, 49 U.S.C.App. § 1305(a), preempted any form of state regulation. When the Tennessee Court of Appeals denied Federal Express' motion for a stay of the TPSC's order to apply for a certificate of convenience and necessity, Federal Express filed suit in this Court for declaratory and injunctive relief on the grounds of federal preemption. Applying the Sixth Circuit's Wycoff analysis, this Court held that the real issue in this case was whether the Tennessee Motor Carrier Act was applicable to Federal Express and that federal preemption arose only as a defense to that issue. Accordingly, the case was dismissed for lack of subject-matter jurisdiction.

Defendants Purolator Carrier and the Tennessee Public Service Commission moved the Court to reconsider its order and to abstain from a decision on the merits. At the hearing on the motion to reconsider, defendants urged that the Court had really abstained from the decision and misnamed the result.[2] Citing a First Circuit case in which an analysis similar to the Sixth Circuit's was questioned, *Colonial Penn Group, Inc. v. Colonial*

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[1] Memorandum of Law, *Federal Express Corp. v. Tennessee Public Service Commission*, No. 3-87-0633 (M.D.Tenn. June 16, 1988).

[2] Transcript of Hearing at 18, June 22, 1988.

Deposit Co., 834 F. 2d 229 (1st Cir. 1987), and a footnote in a Supreme Court case, *Shaw v. Delta Air Lines*, 463 U.S. 85, 96, n. 14, 103 S. Ct. 2890, 2899, 77 L.Ed.2d 490, 500 (1983), defendants argued that the Sixth Circuit's Wycoff analysis was inapplicable because Federal Express cited *Braniff Int'l Inc. v. Florida Public Service Comm'n.*, 576 F. 2d 1100 (5th Cir. 1978), as an analogous case and argued that the threat of irreparable harm to plaintiff mandated federal subject matter jurisdiction. While all the parties agreed that the Court had subject-matter jurisdiction,[3] they also agreed that the law in this area was difficult and unclear. The Court took the motion under advisement.

II.

A reexamination of *Wycoff*, 344 U.S. 237, 73 S. Ct. 236, 97 L.Ed. 291 (1952), only underscores its factual and legal similarity to this case. Like the TPSC, Utah's Public Service Commission said that a motor carrier was subject to state regulation because it engaged in intrastate commerce. The Commission had already filed suit in state court when Wycoff brought its federal action. Wycoff sought two forms of relief: a declaratory judgment that its intrastate transport was actually interstate commerce such that the Commission was preempted from regulating it; and an injunction restraining the Commission from any interference with Wycoff's business as an impermissible burden on interstate commerce. Wycoff held a certificate of convenience and necessity from the Interstate Commerce Commission and was therefore subject to a scheme of federal regulation.

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[3] It is well established that parties to a lawsuit cannot create subject-matter jurisdiction by stipulation where it does not otherwise exist. *See* Wright & Miller, 13 Federal Practice and Procedure, § 3522 at 66-68 (1984 & Supp. 1987); *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites De Guinee*, 456 U.S. 694, 102 S. Ct. 2099, 2104, 72 L.Ed.2d 492 (1982); *In re Rini*, 782 F.2d 603, 608-09 (6th Cir. 1986).

Wycoff is often cited for its dicta about subject matter jurisdiction, but in fact the case was dismissed because it was not ripe. *See* 344 U.S. at 240246, 73 S. Ct. at 238-42. Wycoff had not yet been regulated by the Commission but was trying to guard against the possibility that it might be regulated in the future. *Id.* at 244, 73 S. Ct. at 240. No threat of irreparable harm had occurred to justify an injunction; similarly, lack of a real controversy reduced the claim for a declaratory judgment to a request for an advisory opinion.

The Supreme Court speculated. What if the harm had been immediate, the controversy real, the case ripe? Even then, the Court observed that it could not have heard the merits because subject-matter jurisdiction precedes ripeness. Subject-matter jurisdiction is the power of a federal court to hear a case properly before it. Without that power, even the most lively controversy simply cannot be heard in federal court.

The *Wycoff* doctrine says that where the complaint in an action for a declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action and not of the defense which will determine whether there is federal-question jurisdiction in the District Court. *Id.* at 248, 73 S. Ct. at 242. This is true even if the declaratory complaint sets forth a claim of federal right if that right is in reality a defense to the threatened cause of action. *Id.* In *Wycoff*, the fact that a suit had been filed in state court against the Public Service Commission did not constitute irreparable harm sufficient to justify an injunction; it did, however, correspond to the kind of threatened state court action that urges the state court defendant to seek relief as a declaratory plaintiff in federal court. The same facts that made injunctive and declaratory relief untenable in *Wycoff* also made subject-matter jurisdiction inappropriate. But this does not mean that the reverse is true: that whenever there exists irreparable harm, the federal court therefore has subject-matter jurisdiction over the

controversy. Instead, it is necessary to separate the threat for ripeness and injunctive purposes from the threat for jurisdictional purposes. In *Wycoff* the Court explained that even had the case been ripe (had the threat of harm from the Commission's regulations been real), *nonetheless* it probably would not have had subject-matter jurisdiction over the dispute (the threatened state action had in any event spurred the state court defendants to become declaratory plaintiffs). Ripeness does not preclude the jurisdictional inquiry.

Wycoff has never been overruled and has been recently cited by the Supreme Court with approval. *See Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 16, n. 14, 103 S Ct. 2841, 2849, n. 14, 77 L.Ed.2d 420, 435 (1983). It has been described as an established Supreme Court tenet, Colonial Penn., 834 F.2d at 233 (1st Cir. 1987), and has spawned a split in the Circuits.

At least three circuits have held that when the declaratory plaintiff has a ripe controversy and seeks a declaration of federal law that has some meaning apart from a threatened state action, there is subject-matter jurisdiction even though the declaratory claim could also have been a defense to the state law action.[4]

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[4] *See Town of Springfield v. McCarren*, 549 F. Supp. 1134, 1138-39 (D.Vt. 1982), *cert. denied*, 464 U.S. 942, 104 S. Ct. 360, 78 L.Ed.2d 322 (1983), *citing First Federal Sav. & Loan Assoc. v. Greenwald*, 591 F.2d 417, 423 n.8 (1st Cir. 1979); *Braniff Int'l Inc. v. Florida Public Service Comm'n*, 576 F.2d 1100, 1104-06 (5th Cir. 1978); *Conference of Federal Sav. & Loan Assoc. v. Stein*, 604 F. 2d 1256, 1259 (9th Cir. 1979); *aff'd mem.* 445 U.S. 921, 100 S. Ct. 1304, 63 L.Ed.2d 754 (1980). *Stein* was distinguished by the Sixth Circuit in *Michigan Sav. & Loan v. Francis*, 683 F. 2d 957, 961-62 (1982), which declined to follow it. Similarly, a district court in our circuit explicitly declined to follow the First Circuit's decision in *Greenwald* and the Ninth Circuit's decision in *Stein*. *See Smart v. First Federal SAv. & Loan Assoc. of Detroit*, 500 F. Supp. 1147, 1159 (E.D.Mich. 1980)(rejecting argument that if an actual controversy exists. the court has jurisdiction), *aff'd First Fed. Sav.*

(Footnote 4 continued next page)

Other circuits hold that federal preemption can only be in the nature of a defense to a state court action and provides no independent basis for federal question jurisdiction in a suit for a declaratory judgment.[5] The Sixth Circuit falls into the latter category. Further, our Circuit has also applied the rule in cases in which both declaratory and injunctive relief were sought.

III.

The Sixth Circuit has interpreted *Wycoff* to mean that a regulated party like Federal Express that seeks declaratory and injunctive relief in federal court and argues a state law is preempted by a federal regulatory scheme lacks subject-matter jurisdiction in federal court. In *Michigan Sav. & Loan v. Francis*, 683 F. 2d 957 (6th Cir. 1982), federally regulated savings and loans sought a declaratory judgment and an injunction against application to them of a Michigan anti-redlining statute. Like Wycoff and like the plaintiff in this case, the savings & loans argued that a federal statute preempted state law and that compliance with state law would be impermissibly burdensome. Unlike the *Wycoff* Court, the Sixth circuit did not say the con-

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(Footnote 4 continued)

& Loan Assoc. v. Detroit Bond & Mortgage Investment Co., 687 F.2d 143 (6th Cir. 1982). *Cf. United Air Lines, Inc. v. Division of Industrial Safety*, 633 F. 2d 814 (9th Cir. 1980) (Denial of subject-matter jurisdiction in suit for injunction when allegations of federal question jurisdiction were really a defense to enforcement of state law), *cert. den.*, 454 U.S. 944, 102 S. Ct. 485, 70 L.Ed.2d 255 (1981)(J. White dissenting).

[5] *See Town of Springfield*, 549 F. Supp. at 1138-39, *citing Exxon Corp. v. Hunt*, 683 F. 2d 69 (3d Cir. 1982), *cert. denied*, 459 U.S. 1104, 103 S. Ct. 727, 74 L.Ed.2d at 961-62; *Lawrence County v. State of South Dakota*, 668 F.2d 27, 30-32 (8th Cir. 1982), *questioned in Lawrence County v. Lead-Deadwood School District*, 469 U.S. 256, 105 S. Ct. 695, 83 L.Ed.2d 635 (1985); *cf. Madsen v. Prudential Federal Sav. & Loan Assoc.*, 635 F. 2d 797, 803-04 (10th Cir. 1980), *cert. den.*, 451 U.S. 1018, 101 S. Ct. 3007, 69 L.Ed.2d 389 (1981).

troversy was not ripe for adjudication; instead, the *Wycoff* doctrine was applied to dismiss the case for lack of subject-matter jurisdiction. As this Court discussed at length in its June 16 Memorandum, *Michigan Sav. & Loan* is directly on point: the procedural posture of the parties is identical; the relief sought is the same; and the legal arguments are very similar. This case has never been overruled. It is binding authority on this Court.

In at least three cases following *Michigan Sav. & Loan*, the Sixth Circuit has relied upon its *Wycoff* analysis to dismiss cases for lack of subject-matter jurisdiction. None of those cases are as closely analogous to this case as are *Wycoff* and *Michigan Sav. & Loan*. Yet, in a wide variety of contexts, the Sixth Circuit has applied its *Wycoff* analysis without qualification.

In *First Fed. Sav. & Loan Assoc. v. Detroit Bond & Mortgage Investment Co.*, 687 F. 2d 143 (6th Cir. 1982), federally regulated savings and loans sought a declaratory judgment that a state law making due-on sale clauses unenforceable was preempted by federal law. Plaintiffs did not seek an injunction. The Sixth Circuit reaffirmed that it lacked subject-matter jurisdiction over the case under the rule in *Michigan Sav. & Loan*, despite the existence of a Supreme Court case that favored the plaintiffs on the merits. Although the existence of federal jurisdiction in these situations is a close question, "the law of this circuit is that there is no federal jurisdiction where federal preemption is raised as a defense to a threatened state action." 687 F. 2d at 145.

The *Wycoff* doctrine has been applied in other kinds of cases as well. In *City of Saginaw v. Service Employees Int'l Union*, 720 F. 2d 459 (6th Cir. 1983), a union appealed a declaratory judgment that the arbitral award rendered to it against the employer was unenforceable because it violated the Comprehensive Employment Training Act [CETA].[6] The union had

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[6] Comprehensive Employment Training Act, 29 U.S.C. §§ 801, *et seq.*

already sued in state court to enforce its contractual award. On appeal, the Sixth Circuit dismissed for lack of subject-matter jurisdiction. Usually, section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, preempts any cause of action under state law whatsoever, such that dismissal under the *Wycoff* analysis, which looks to the character of the threatened state court action, would be inappropriate. In this case, however, the employer did not fall within the federal definition of an "employer" for purposes of section 301. Since the threatened state court action therefore could arise only under state law, federal law was implicated only as a defense to the union's claim. Citing a then recent Supreme Court case, the Court observed that an action could "arise under" state law and preclude federal question jurisdiction even if the state action involved a federal defense, including the defense of preemption, even if the defense was anticipated in the state court complaint, and even if both parties admitted that the federal defense was the only real issue in the lawsuit. *See* 720 F. 2d at 462, n. 5, citing *Franchise Tax*, 463 U.S. at 14, 103 S. Ct. at 2848.

In *Bell & Beckwith v. United States, I.R.S.*, 766 F. 2d 910)6th Cir. 1985), the Sixth Circuit applied its *Wycoff* rule to interpleader actions. A brokerage firm filed an action for interpleader when the I.R.S. levied a tax lien on an investment account managed by the firm and when the alleged owner of the account demanded payment as well. A United States Magistrate distributed the account to the I.R.S., and the owner appealed. The Sixth Circuit reversed and remanded with instructions to dismiss the case for lack of subject-matter jurisdiction. In its *Wycoff* analysis, the court scrutinized what the declaratory defendants to the interpleader action could have claimed as plaintiffs in a state court action. *See* 766 F. 2d at 915-917. The nature of the threatened action determines whether a federal question is involved. The Court observed that application of a Wycoff analysis does not always lead to dismissal. In patent cases, for

example, the infringer typically brings an action for a declaratory judgment in federal court in anticipation of the patent owner's claim. Examination of the threatened action by the patent owner, however, reveals that this claim also would necessarily arise under federal law. Because the nature of the threatened action by the patent owner would arise under federal law, the fact that the owner happens to have been brought into federal court as a defendant in a declaratory judgment action does not preclude federal question jurisdiction. The infringer is not obtaining access to federal court indirectly when it could not have obtained it directly. In these unusual kinds of cases, *Wycoff* analysis supports, and does not undercut, subject-matter jurisdiction. *See* 766 F. 2d at 913; *Franchise Tax*, 463 U.S. at 19, n. 19, 103 S. Ct. at 2851 n. 19. This result did not occur in *Bell* however. After concluding that the actions each defendant could have brought against the broker and among themselves would have arisen under state law, the court dismissed the suit for lack of subject-matter jurisdiction.

District courts in this circuit have also applied the Sixth Circuit's *Wycoff* analysis. In *ANR Pipeline v. Conoco, Inc.*, 646 F. Supp. 439 (W.D. Mich. 1986), a natural gas distributor had sought a declaratory judgment in state court that its performance of offshore contracts should be excused. Conoco, the defendant producer, sought removal to federal court, arguing that all offshore contracts were governed by federal law.[7] The district court observed that ANR went to state court to get an anticipatory defense to any claim Conoco might bring for breach of contract. 646 F. Supp. 447-48. But ANR had not engaged in artful pleading, disguising what was really a defense to a federal claim in state law rubic. Any claim Conoco could have brought for breach—i.e., the threatened action —would have arisen under state and not federal law. Hence, removal was inappropriate.

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[7] The Outer Continental Shelf Lands Act ["OCS-LA"], 43 U.S.C. § 1331 *et seq.*

In another case from the Eastern District of Michigan, the court applied a *Wycoff* analysis and concluded that subject-matter jurisdiction over plaintiff's claim existed. *Michigan United Food & Comm. Wkrs. Union v. Baerwaldt*, 572 F. Supp. 943 (E. D. Mich. 1983), *rev'd on other grounds*, 767 F. 2d 308 (6th Cir. 1985), *cert. den.*, 474 U.S. 1059, 106 S. Ct. 801, 88 L.Ed.2d 777 (1986), has been discussed in detail in the Court's June 16 Memorandum and will only be briefly addressed here. In this case, an employee benefit trust sought both a declaratory judgment and an injunction against the state's insurance commissioner when a recently enacted state law was in apparent conflict with ERISA.[8] The regulated party sought both kinds of relief against a state regulatory entity and argued federal preemption as the basis for the court's subject-matter jurisdiction. The district court did not disregard Wycoff but applied its rule to conclude that subject-matter jurisdiction existed. Because the district court's jurisdictional finding was based on four separate rationales[9] and because the Sixth Circuit declined to comment on any of them, it is impossible for this Court to discern which of these reasons the Court of Appeals approved.

The history of *Wycoff* applications in our circuit since the *Michigan Sav. & Loan* decision has been traced to show how deeply entrenched this analysis has become. Both *Wycoff* and

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[8] The Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.*

[9] Grounds relied upon by the Michigan district court included the following: there had been no state agency action against which the trust sought to create an anticipatory defense; if the agency had so acted, the trust would not have been the defendant in that action; ERISA is unique both because of its express preemptive language and because it provides a separate cause of action (and basis for jurisdiction); and unlike Wycoff's case, this dispute was ripe. *See Michigan United Food and Comm. Wkrs. Unions v. Baerwaldt*, 572 F.Supp. 943 (E.D.Mich. 1983), *rev'd on other grounds*, 767 F.2d 308 (6th Cir. 1985), *cert. den.*, 474 U.S. 1059, 106 S. Ct. 801, 88 L.Ed.2d 777 (1986).

Michigan Sav. & Loan are directly on point; *Wycoff*'s facts are virtually identical to those in this case. Neither case has been overruled: to the contrary, both have engendered their own body of caselaw. The later Sixth Circuit cases can be distinguished from our facts because the plaintiff's did not seek an injunction, as in *First Federal*, or because they are not actions against state regulatory agencies, like *ANR Pipeline*.[10] In the subsequent district court case that contains both of these elements, it is clear that the Sixth Circuit believed subject-matter jurisdiction existed but unclear why it believed this. Since the 1982 decision in *Michigan Sav. & Loan*, this Circuit as well as district courts within it have continued to rely upon Wycoff and even to apply it to very different kinds of cases, such as *Bell*. Hence, this Court is bound by the reasoning in both *Wycoff* and *Michigan Sav. & Loan*, both of which are still good law in this Circuit.

IV.

Interestingly, the parties in this case have not cited to additional Sixth Circuit authority to support their position that the Court has subject-matter jurisdiction over their dispute.[11] Instead, they turn to cases from other Circuits and urge the Court to adopt the rules therein. Plaintiff relies on *Braniff Int'l Inc. v. Florida Public Service Comm'n*, 576 F.-2d 1100 (5th Cir. 1978), and defendants cite *Colonial Penn Group Inc. v. Colonial Deposit Co.*, 834 F. 2d 229 (1st Cir. 1987).

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[10] In fact, these cases were omitted from the Court's original Memorandum precisely because of such dissimilarities.

[11] Defendants say that both *First Federal* and *Michigan Sav. & Loan* were solely suits for declaratory judgments, although the latter case from which the Sixth Circuit rule is derived was an action for both declaratory and injunctive relief. See Defendant's Memorandum of Law in Support of Defendant's Motion to Reconsider at 2. Plaintiff distinguishes the Sixth Circuit line of cases in a sentence, stating that no indication of irreparable injury was present in them. See Response to Defendant's Motion for Reconsideration at 608-609.

Braniff is a Fifth Circuit case decided four years before the Sixth Circuit's decision in *Michigan Sav. & Loan.* It bears a factual similarity to this case. In *Braniff*, six airlines sought a declaratory judgment and an injunction against the Florida Public Service Commission, which had issued a show cause order requiring the airlines to comply with state law. A Florida statute gave the Commission the power to disapprove changes in rates, fares, or schedules within the state; the Commission's rule required air carriers to file notice of their intrastate changes in rates, fares, and schedules.[12] The airlines argued, inter alia,[13] that the state regulation was preempted under federal law and that it was an undue burden on interstate commerce. 576 F. 2d at 1102. After the district court dismissed the case under *Wycoff*, the Fifth Circuit reversed.

The Court of Appeals asked the extent to which *Wycoff* restricted a federal court from hearing a constitutional challenge to a state statute. Essentially, *Wycoff* was distinguished on two grounds. According to *Braniff*, Wycoff had never challenged the constitutionality of a state statute or administrative ruling, as the airlines had. *Id.* at 1103. Further, the state entity had not acted in *Wycoff*, according to the Court, whereas in *Braniff* the state had issued a show cause order. The threat of irreparable harm, which was lacking in *Wycoff*, confirmed that the case was ripe for decision.[14] The airlines were not merely seeking to ward off

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[12] *See* FlaStat. § 330.53 (1973); FlaAdmin. Code, Rule 25.15-50.

[13] In addition to their preemption and interstate commerce arguments, the airlines also argued that the state attempts to regulate them violated the Due Process and Equal Protection clauses of the Fourteenth Amendment. *Braniff*, 576 F. 2d at 1102.

[14] Note that the Fifth Circuit determined only that the case was ripe and subject-matter jurisdiction existed-it did not reach the issue of whether an injunction was appropriate, but only observed that it was not foreclosed. *See* 576 F. 2d at 1105. In fact, the district court had denied the request for a stay or a preliminary injunction. *See id.* at 1102, n. 4.

possible action by the PSC at some future date: the regulation had been enacted and the show cause order issued. *Id.* at 1105. Hence, subject-matter jurisdiction was present The Court held that when a party seeks injunctive and declaratory relief based upon the unconstitutionality of a state statute and where there are no other impediments to federal question jurisdiction, the fact that the constitutional claim might be raised as a defense before the state administrative entity does not deprive the court of jurisdiction. 576 F. 2d at 1106.

Despite the similarities between *Braniff* and the facts of this case, important differences remain. First, the preemption arguments are critically dissimilar. In *Braniff*, the airlines argued that the state statute and administrative rules specifically enacted to regulate the rates, fares, and schedules of air carriers were unconstitutional in their entirety and from their inception. Hence, no order issued from the state agency to the airlines to enforce those rules was considered proper. By contrast, Federal Express is much more like Wycoff company, that wanted to prevent the Commission's regulation before it had begun. Federal Express does not argue that the Tennessee Motor Carrier Act regulating intrastate ground carriage is unconstitutional ab initio but that its application to an air carrier is.[15] It does not claim that no cause of action may ever be brought under the Act but that it cannot be enforced against Federal Express.[16] The only requirement imposed by the TPSC's order as it now stands is that Federal

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[15] Essentially, Wycoff also claimed that a state regulatory scheme not yet in existence was preempted by the Supremacy Clause. The Fifth Circuit's assertion that this was not a constitutional challenge reads out the entire basis for Wycoff's suit.

[16] *Cf. Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 26, 103 S. Ct. 2841, 2844, 77 L.Ed.2d 420, 441 (1983) (Through ERISA could preclude enforcement of the State's tax levy in this case, the cause of action to enforce the levy under state law was not itself preempted by ERISA).

Express apply for a Certificate of Convenience and Necessity, submitting to regulations TPSC could issue in the future. It is a kind of preamble to the regulatory scheme already in place in *Braniff*. Like the Utah Public Service Commission in *Wycoff*, the TPSC has not yet issued a single regulation concerning integrated carriers. The declaratory plaintiff is seeking to ward off the possibility that it might be unconstitutionally regulated in the future, not to challenge a constitutionally deficient law already in place. Echoing the *Wycoff* court, even if Federal Express is engaged solely in interstate commerce, the Court cannot say that there is nothing whatever that the State may require. *Wycoff*, 344 U.S. at 245, 73 S. Ct. at 241 (1952). When the request is not for preliminary findings and conclusions intended to fortify the litigant against future regulation, it would be a rare case indeed in which the relief should be granted. Id. at 246, 73 S. Ct. at 241.

Further, the Fifth Circuit's analysis of the state agency's action in *Wycoff* seems somewhat misplaced. The Utah Commission *had* taken action against the regulated party by bringing suit in state court. Similarly, in this case the TPSC has conducted a hearing that required Federal Express to show cause why the Tennessee Motor Carrier Act should not apply to it. In *Wycoff*, the Supreme Court said that the state court action on these particular facts[17] was not enough to create the kind of irreparable harm to jusify an injunction, but it was precisely enough to spur Wycoff into federal court as a declaratory plaintiff. *Id.* at 245, 248, 73 S. Ct. at 241-43. Thus, the inquiry into the state's action or the threatened harm has separate aspects, injunctive and jurisdictional. The Court underscores this by explaining that

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[17] In its complaint, Wycoff had sought both an injunctive and a declarotory judgment but had apparently abandoned the former claim on appeal. Nonetheless, the Court explained why an injunction would have been inappropriate. *See Public Service Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 73 S. Ct. 236, 97 L.Ed. 291 (1952).

even if the case had been ripe, subject-matter jurisdiction would have been questionable.

> Since this case should be dismissed in any event, it is not necessary to determine whether, on this record, the alleged controversy over an action that may be begun in state court would be maintainable under the head of federal-question jurisdiction. But we advert to doubts upon that subject to indicate the injury that would be necessary if this case . . . rested merely on [a] threatened suit in state court . . . [T]his suit cannot be entertained as one for injunction and should not be continued as one for a declaratory judgment.

Id. at 248-249, 73 S. Ct. at 242-43. Hence, the fact that Federal Express obtained a preliminary injunction which has now been dissolved does not confer subject-matter jurisdiction on the parties. These are two separate inquiries. The issue of jurisdiction precedes the issue of the harm to Federal Express. This Court cannot reach the merits of th controversy unless it has the power to do so, assuming the dispute is ripe for adjudication.

The Fifth Circuit in *Braniff* admits that its real concern is that a plaintiff not be allowed, by asserting a defense to impending or threatened state action, to proceed under the fountainhead of federal-question jurisdiction in a case which could not otherwise be heard in federal court. *Braniff*, 576 F. 2d at 1105, emphasis added. The court was apparently reformulating the *Skelley* doctrine: if but for the availability of a declaratory judgment the declaratory plaintiff's claim would have arisen only as a defense to a cause of action brought by the declaratory defendant under state law, no subject-matter iurisdiction exists. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 70 S Ct. 876, 94 L.Ed. 1194 (1950). In this case, the state court action anticipated by the complaint is that the TPSC will attempt to enforce its show cause order against Federal Express under Tenn.Code Ann. § 65-15-121. Preemption is an issue that Federal Express would raise as

a defense to the operation of the Tennessee Motor Carriers Act. Such a case could not be removed to this court because federal law would arise only as a defense. *See Franchise Tax,* 463 U.S. 1, 103 S. Ct. 2841, 77 L.Ed.2d 420. *See also, ANR Pipeline,* 646 F. Supp. 439. If the lawsuit could not have come to federal court through the front door of removal, it also cannot come to federal court through the back door of the Federal Declaratory Judgment Act.

Despite *Braniff*'s facial similarity to this case, it is not persuasive authority. The basis for preemption in both cases is different. *Braniff*'s analysis of *Wycoff* is problematic. Most importantly, *Braniff* adopts a view of *Wycoff* that is counter to that adopted in more recent case law in this circuit. Accordingly, *Braniff* is not controlling in this case.

At the hearing on the motion to reconsider, defendants cited *Colonial Penn Group Inc. v. Colonial Deposit Co.*, 834 F. 2d 229 (1st Cir. 1987), as a case in which a Circuit Court had reevaluated its *Wycoff* analysis. The facts are dissimilar to those before the Court,[18] and the First Circuit affirmed the district court's dismissal of the lawsuit for lack of subject-matter jurisdiction. *Id.* After tracing the history of *Wycoff* the court distinguished cases in which the plaintiff challenges a state regulatory scheme applicable to it and the defendant is a state official. Id. at 236-

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[18] *Colonial Penn* was not an action in which a regulated entity sought relief from a regulating agency on preemption grounds. In state court, a local bank sued Colonial Penn and its subsidiaries for a declaratory judgment and an injunction alleging unfair competition and trademark infringement under state common law. The declaratory defendants in state court filed suit in federal court, arguing that they were entitled to declaratory and injunctive relif[sic] under the Lanham Act, 15 U.S.C. § 1121. The court concluded that because the second action was only a defense to the original state law action, jurisdiction was lacking. 834 F. 2d at 236. This was true even though the Lanham Act issues might be the central feature of the case. *Id.*

238. Concurrent jurisdiction was said to be available to the plaintiff to determine whether a federal statute preempted the state regulation. Because the facts in *Colonial Penn* did not fall within that definition the court observed that what it called the exception to the *Wycoff* rule did not apply. *Id.* at 236-238.

Because the *Colonial Penn* court did not have similar facts before it, the First Circuit did not have to reach the issue of how to decide a case like this one, although the Court's dicta indicates it would acknowledge subject-matter jurisdiction. More importantly, the difficulty with carving out this exception to *Wycoff* is that the exception restates *Wycoff*'s facts but reaches an opposite result. Wycoff too sought to avoid state agency regulation. Wycoff sought a declaration that its business was interstate in character and an injunction forbidding interference. The facts in *Michigan Sav. & Loan* may be characterized in the very same way. When the *Wycoff* Court expressed doubt about its subject-matter jurisdiction in just such a case, and when neither case has ever been overturned, this Court must be bound by their teachings.

It is no secret that the Circuits are split in their applications of the Wycoff dicta.[19] But resolution of these conflicts is not a matter to be addressed by this district court.

V.

The most serious challenge to this Circuit's *Wycoff* rule are footnotes in a series of Supreme Court opinions following *Wycoff*. These footnotes are problematic because they cite *Wycoff* with approval but suggest a gloss on the case that appears

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[19] *See supra* notes 3-4. *See also, Annotations, Federal Question Jurisdiction in Declaratory Judgment Suit Challenging State Statute or Regulation on Grounds of Federal Preemption*, 69 A.L.R. Fed. 753 (1984 & 1986 Suppl.).

to contradict Wycoff itself. Further, the footnotes are dicta that are not controlling in the cases in which they appear.

In *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 103 S. Ct. 2841, 77 L.Ed.2d 420 (1983), a state statute[20] required an employee's vacation trust to pay withholding taxes to the state. When the trust refused to pay, the tax board sued in state court to collect the taxes under state law. The trust, arguing that application of state law was preempted by ERISA, sought to remove the lawsuit to federal court. In a unanimous opinion, the Supreme Court held that a federal district court had no subject-matter jurisdiction to hear such a case.

After a thorough discussion of the Holmes test and the well-pleaded complaint rule,[21] the Court explained that application of the rule may seem awkward when neither the obligations of state law nor defendant's failure to comply are disputed, and the parties admit that the only real question for resolution is the defense of preemption. See 463 U.S. at 12, 103 S. Ct. at 2848. Yet, subject-matter jurisdiction was not present when preemption arose as a defense to obligations that were created by state law without reference to federal law. *Id.*[22] This meant that the tax

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[20] Cal.Rev. & Tax Code Ann. §§ 18817-18 (West Supp. 1983).

[21] The Holmes test says that a claim usually arises under the law that creates the cause of action. *See American Well Works Co. v. layne & Bowler Co.*, 241 U.S. 257, 260, 36 S. Ct. 585, 60 L.Ed. 987 (1916). Under the well-pleaded complaint rule, examination of the complaint alone and not the defense determines whether a claim arises under federal law. *See Franchise Tax*, 463 U.S. at 10-11, 103 S. Ct. at 2846-47. Not every federal issue creates a federal question.

[22] The Court further explained that "by unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the Constitution . . . because prohibited thereby." *Franchise Tax*, 463 U.S. at 12, 103 S. Ct. at 2848. This does not mean that no federal court will ever hear the federal preemption defense, however, because the state court's decision may be subject to Supreme Court review. *Id. cf. Wycoff*, 344 U.S. at 247-48, 73 S. Ct. at 242-43 (ultimate recourse may be had to the Supreme Court if a state court has denied a federal right).

board's first cause of action under the California Tax Code arose under state law and could not be removed. Not only did this characterization of the claim meet the Holmes test, it conformed to common sense as well.

> California law establishes a set of conditions, without reference to federal law, under which a tax levy may be enforced; federal law becomes relevant only by way of a defense to an obligation created entirely by state law. The well-pleaded complaint rule was framed to deal with precisely such a situation.

Id. at 13, 103 S Ct. at 2848. (citation omitted). The tax board's second cause of action was more difficult to characterize. Preemption was a necessary ingredient to the tax board's claims under the California Declaratory Judgment Act. The Court applied the *Skelley* rule[23] to state declaratory judgments and asked if but for the availability of the declaratory judgment the federal claim would have arisen solely as a defense to a state-created action. Id. at 18, 103 S. Ct. at 2850. Hence, the Court examined what would have happened if the trust rather than the tax board had originally brought the lawsuit.

Had the trust initially sued in state court, the Court observed, removal might have been appropriate because ERISA gives it an express cause of action. Alternately, the trust "*might* have been able to obtain federal jurisdiction under the doctrine applied *in some cases* that a person subject to a scheme of federal regulation may sue in federal court to enjoin application . . . of conflicting state regulations . . . ." *Id.* at 20, n. 20, 103 S. Ct. at 2851 n. 20 (emphasis added). The trust's cause of action would have arisen under federal law because it sought to enforce a federal right. By

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[23] *See Skelley Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 70 S. Ct. 876, 94 L.Ed. 1194 (1950).

contrast, the State had no federal right for which protection had been sought. Ready access to its own enforcement machinery meant it had no need for access to a federal forum. *Id.* at 20-22, 103 S. Ct. at 2851-53. Therefore, while the trust might have brought the lawsuit under the second claim in federal court, the state could not. Accordingly, removal was inappropriate. *Id.* In *Franchise Tax*, the Court twice cited its *Wycoff* decision with approval. See id. at 16, n. 14, 103 S. Ct. at 2850 n. 14 and at 19, n. 19, 103 S. Ct. at 2851 n. 19.

The case before this Court is similar to *Franchise Tax* in that it involves a prior administrative action to enforce a state statute from which the regulated party claims an exemption under federal law. It is distinct in the procedural posture of the parties. As in *Wycoff* and *Franchise Tax*, the Court has considered what kind of action the declaratory defendant could bring. In this case, the TPSC could sue to enforce its order under Tenn.Code Ann. § 65-15-121. Federal Express would raise the issue of federal preemption as a defense. Unlike ERISA, the Airline Deregulation Act would give Federal Express no cause of action for enforcement of its provisions. Federal Express argues not that federal law preempts a cause of action under state law (so that, as in patent cases, the case would arise under federal law no matter who brought it) but that it preempts application to it of an otherwise valid state law.[24] The tentative language of footnote 20 in *Franchise Tax*, which the Court did not rely upon as controlling, is unpersuasive in light of the direct language on point in *Wycoff* and *Michigan Sav. & Loan*. Federal Express seeks to assert no federal cause of action but in essence claims a federal defense to operation of a state statute that, like the California Tax

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[24] If a federal *cause of action* completely preempts a state cause of action, any complaint that comes within the scope of the federal cause of action necessarily arises under federal law. *Franchise Tax*, 463 U.S. at 24, 103 S. Ct. at 2854 (emphasis added).

Code, established a set of conditions without reference to federal law. Hence, *Franchise Tax* supports the result of this Court's June 16 memorandum.

Language that echoes the Supreme Court in *Franchise Tax* may also be found in two later footnotes. *Shaw v. Delta Air Lines*, 463 U.S. 85, 103 S. Ct. 2890, 77 L.Ed.2d 490 (1983) determined that a portion of New York state law[25] concerning pregnancy benefits was preempted by ERISA. In footnote 14, the Court said that when a regulated party seeks injunctive relief from state regulation on the ground that the regulation is preempted by federal law, a federal question is presented. 463 U.S. at 96, 103 S. Ct. at 2899. *Shaw* does not discuss *Wycoff*. Similar language appears in *Lawrence County v. Lead-Deadwood School District* No. 40-1, 469 U.S. 256, 105 S. Ct. 695, 83 L.Ed.2d 635 (1985), in which a South Dakota county refused to distribute the federal revenues it received as compensation for its tax immune properties according to a state statutory scheme.[26] The case came to the Supreme Court through a state court action in which the county argued that the federal Payment in Lieu of Taxes Act, 31 U.S.C. § 6901 *et seq.*, preempted state law. The county had attempted to bring an action in federal court and been dismissed on appeal for lack of subject-matter jurisdiction. *Lawrence County v. State of South Dakota*, 668 F. 2d 27 (8th Cir. 1982). In a footnote, the Court said the Eighth Circuit's ruling was erroneous because the county had also sought an injunction under the Supremacy Clause. *See* 469 U.S. 259, n. 6, 105 S. Ct. 697 n. 6.

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[25] The Human Rights Law, NY Exec. Law §§ 290-301 (McKinney 1982 and Supp. 1982-1983) was held to be partially preempted by federal law; the Disability Benefits Law, NY Work Comp. Law §§ 200-242 (McKinney 1965 and Supp. 1982-1983) was not preempted.

[26] S.D.Codified Laws § 5-11-6 (1980).

The statements in these cases are undeniably troublesome because they imply that the approach adopted in *Michigan Sav. & Loan* may be erroneous. But they are even more confusing in light of *Wycoff* who just like this plaintiff was a regulated party seeking declaratory and injunctive relief to guard against the possibility of adverse state regulation. As stated in this Court's June 16 Memorandum, the question of ripeness and the policy of deference to state administrative agencies also supports dismissal.

Both *Wycoff* and *Michigan Sav. & Loan* are analogous factually and legally to the case before the Court. Neither case has been overruled. Later cases in our circuit, while not analytically as close as these cases, nonetheless rely extensively on a *Wycoff* analysis. The Supreme Court's language in later cases, although strongly put, is not controlling in the cases in which it appears. It is unclear how this language fits in with *Wycoff*, which is still approved by the Supreme Court. When neither of the cases that are unquestionably binding on this Court have been overruled or modified, this Court is loathe to ignore them absent further guidance.

Accordingly, the motion to reconsider is denied.

APPENDIX D

NOT FOR PUBLICATION

88-5974

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FEDERAL EXPRESS CORPORATION,
Plaintiff - Appellant,

v.

TENNESSEE PUBLIC SERVICE
COMMISSION, et al.,
Defendant - Appellee.

ON APPEAL FROM THE
MIDDLE DISTRICT OF
TENNESSEE.

BEFORE: KEITH and NORRIS, Circuit Judges; and EDWARDS, Senior Circuit Judge.

PER CURIAM: Plaintiff Federal Express Corporation ("Federal Express") appeals from the judgment of the district court dismissing its case for lack of federal subject-matter jurisdiction and denying its request for relief from state regulations promulgated by defendant Tennessee Public Service Commission ("the Commission").

On June 9, 1987, the Commission made an administrative determination that Federal Express is a motor carrier engaged in intrastate transportation and is subject to state regulation under the Tennessee Motor Carriers Act, Tenn. Code Ann. § 65-15-101, *et seq*. The Commission rejected Federal Express' arguments that the Airline Deregulation Act of 1978, 49 U.S.C.§ 1350 (a), preempted any form of state regulation. After the Tennessee Court of Appeals denied Federal Express' motion for

a stay of the Commission's order demanding compliance with the Tennessee state regulations, Federal Express filed suit in federal district court for declaratory and injunctive relief on the grounds of federal preemption. Relying on *Public Service Comm'n v. Wycoff Co.*, 344 U.S. 237 (1952) and *Michigan Savings and Loan v. Francis*, 683 F.2d 957 (6th Cir. 1982), the district court identified the crucial issues of the case: whether the Tennessee Motor Carrier Act was applicable to Federal Express and whether federal preemption arose only as a defense to that initial issue. Declining to reach the merits of the dispute, the district court dismissed the case for lack of federal subject-matter jurisdiction. *See Federal Express Corp. v. Tennessee Public Serv. Comm'n*, 693 F. Supp. 598 (M.D. Tenn. June 16, 1988) (denying Federal Express' request for relief from state regulations); *Federal Express Corp. v. Tennessee Public Serv. Comm'n*, No. 3087-0633, mem. op. (M.D. Tenn. Aug. 17, 1988) (denying Federal Express' motion for reconsideration).

Upon review of the well-reasoned opinion of the Honorable Thomas A. Wiseman, Jr., Chief Judge of the United States District Court for the Middle District of Tennessee, we conclude that he properly analyzed the issues and reached a correct result. Accordingly, we AFFIRM based on the reasoning of the district court opinion.

Case No. 88-5974
Federal Express v. Tennessee Public Service

EDWARDS, Senior Circuit Judge.

Respectfully, I dissent. I agree with *both* parties in this matter that the District Court erred in holding that the federal court lacked subject matter jurisdiction. I dissented in this court's decision in *Michigan Savings and Loan v. Francis*, 683 F.2d 957 (6th Cir. 1982), and I believe I must do so again.

The United States Supreme Court in *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, at 96 n. 14 (1983), albeit in a footnote, appears to me to have settled this matter:

> It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights. *See Ex Parte Young*, 209 U.S. 123, 160-162, 52 L.Ed. 714, 28 S.Ct. 441 (1908). A plaintiff who seeks injunctive relief from state regulation on the ground that such regulation is preempted by a federal statute which by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve.

463 U.S. at 96, n. 14 (citations omitted).

This case comes to us on a motion for injunctive and declaratory relief. A claim for injunctive relief in a case such as this, where the potential for immediate and irreparable injury is present and where federal preemption and the Supremacy and Commerce Clauses of the U.S. Constitution lie at the heart of the matter, *cf. Public Service Commission v. Wycoff*, 344 U.S. 2327 (1952), is within the ambit of federal subject matter jurisdiction. *See Middle South Energy V. Arkansas Public Service Commission*. 772 F.2d 404 (8th Cir. 1985), *cert, denied, Ratepayers Fight Back v. Middle South Energy*, 474 U.S. 1102 (1986); *Braniff International, Inc. v. Florida Public Service Commission*, 576 F.2d 1100 (5th Cir. 1978).

If the federal courts lack subject matter jurisdiction to decide whether the Airline Deregulation Act prohibits states from regulating Federal Express, then fifty states will examine the same federal preemption claim and reach varying results, in direct conflict with the Interstate Commerce Clause and Congressional intent.

I would reverse the District Court's opinion and remand for a determination on the merits.

878 F.2d 381

DECISIONS WITHOUT PUBLISHED OPINIONS

UNITED STATES COURT OF APPEALS

Sixth Circuit

DECISIONS WITHOUT PUBLISHED OPINIONS

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Adkins v. Seabold	88-6356, 88-6357, 88-6358, 88-6359	6/23/89	AFFIRMED	W.D.Ky.
Blandford v. Sowders	89-5127	6/23/89	AFFIRMED	W.D.Ky.
Bryan v. Northrop	88-1314	6/23/89	AFFIRMED IN PART AND REVERSED IN PART	W.D. Mich.
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Cook v. Parke	88-6381	6/26/89	AFFIRMED	E.D.Ky.
Comett v. Comett Coal Co.	88-3744	5/18/89	AFFIRMED	Ben.Rev.Bd.
Conk v. Secretary of Health and Human Services	88-1887	7/3/89	AFFIRMED	E.D.Mich.
Culp v. U.S. Parole Com'n	88-6265	6/23/89	AFFIRMED	W.D.Tenn.; Appeal after remand 732 F.2d 153
Daniel v. Ohio Cas. Ins. Co.	88-5797	7/5/89	APPEAL DISMISSED; CASE REMANDED	E.D.Ky.
Darnell v. Tennessee Valley Authority	88-6413	6/23/89	VACATED AND REMANDED	E.D. Tenn.
Dixon v. Dutton	88-5483	7/5/89	APPEAL DISMISSED	M.D. Tenn.
Evans v. Director, Office of Workers' Compensation Programs, U.S. Dept of Labor	87-3977	4/4/89	REMANDED	Ben.Rev.Bd.
Federal Exp. Corp. v. Tennessee Public Service Com'n.	88-5974	7/3/89	AFFIRMED	M.D.Tenn., 693 F.Supp.598
Flippin v. Martin	88-6337	6/23/89	AFFIRMED	W.D.Ky.
Giannone v. Citizens Banking Co.	88-3768	7/3/89	AFFIRMED	N.D.Ohio
Graham v. Haberlin	88-6436	6/26/89	AFFIRMED	W.D.Ky.
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APPENDIX E

No. 88-5974

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Federal Express Corporation
Plaintiff-Appellant,

v.

Tennessee Public Service
Commission, et al.,
Defendant-Appellee.

ORDER

BEFORE: KEITH and Norris, Circuit Judges; EDWARDS, Senior Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other judges of this court, and a majority of judges not having requested rehearing en banc, the petition for rehearing has been referred to the original panel.

Both parties, in addressing the petition for rehearing, noted their agreement that the panel's ruling was incorrect, on the jurisdictional issue raised by the appeal. It also appears to be inconsistent with the decision (recommended for full-text publication) of another panel of this court in *CSXT, Inc. v. Pitz*, Nos. 88-1629 & 88-1642 (6th Cir. Aug. 22, 1989).

Accordingly, the panel has concluded that its opinion should be amended by deleting the final paragraph and substituting this language:

> However, as this court recently pointed out in *CSXT, Inc. v. Pitz*, Nos. 88-1629 & 88-1642 (6th Cir. Aug. 22, 1989),

the district court did have jurisdiction. Accordingly, the judgment of the district court is reversed, and this cause is remanded for further proceedings according to law, including consideration of the question of abstention in view of this court's opinion in *CSXT, Inc. v. Pitz*.

Having so amended our original opinion, the petition for rehearing is denied.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Clerk

MANDATE ISSUED: OCTOBER 24, 1989

COSTS TAXED: NONE Clerk

DECISIONS WITHOUT PUBLISHED OPINIONS —Continued

Title	Docket Number	Date	Disposition	Appeal from and Citation (if reported)
E.E.O.C. v. Patrick Henry Educ. Ass'n	90-3423, 90-3346	8/8/90	VACATED	N.D.Ohio, 741 F.Supp.670
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Fleetwood v. Bailey	89-2169	8/8/90	AFFIRMED	W.D.Mich.
Ford v. Tarter	89-6421	8/1/90	AFFIRMED	W.D.Ky.
Franklin v. Anderson	89-6312	8/8/90	AFFIRMED	M.D.Tenn.
Fugate v. U.S.	89-5884	8/8/90	AFFIRMED	W.D.Ky.
Gillenwater v. Parke	89-6239	8/8/90	VACATED	E.D.Ky.
Green v. Smith	89-6522	8/13/90	AFFIRMED	W.D.Ky.
Hardin v. Lahiri	89-2158	8/9/90	AFFIRMED	E.D.Mich.
Harris v. Jones	89-2250	8/2/90	AFFIRMED	E.D.Mich.
Hufstetler v. State of Tenn.	89-6309	8/2/90	AFFIRMED	M.D.Tenn.
Iles v. Logo Paris, Inc.	89-2136	8/14/90	AFFIRMED	E.D.Mich.
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Kane v. Rochlin	89-2280	8/3/90	AFFIRMED	E.D.Mich.
Kin Sun Yuen v. Story	89-6389	8/3/90	AFFIRMED	E.D.Ky.
Lee v. U.S.	89-6431	8/9/90	AFFIRMED	E.D.Tenn.
Lewis v. Blue Diamond Coal Co.	89-4028	8/10/90	AFFIRMED	Ben.Rev.Bd.; Appeal after remand 820 F.2d 405
Long v. Hancock	89-6233	8/8/90	AFFIRMED	W.D.Ky.
McDowell v. Liberty Cash Grocers, Inc.	90-5027	8/13/90	AFFIRMED	W.D.Tenn.; Appeal after remand 863 F.2d 1302
McKaye v. Toombs	89-2202	8/2/90	AFFIRMED	W.D.Mich.
Martin v. Hofbauer	89-2310	8/2/90	AFFIRMED	E.D. Mich.
Martin v. Jabe	89-2113	8/10/90	AFFIRMED	E.D.Mich.
Means v. Montgomery	89-6313	8/3/90	AFFIRMED	W.D.Ky.
Medina v. Lydick	90-1065	8/14/90	AFFIRMED	E.D.Mich.
Miller v. Gluch	89-1910	8/2/90	AFFIRMED	E.D.Mich.
Mitchell v. Davis	89-6214	8/2/90	AFFIRMED	E.D.Tenn.
Mitchell v. Jones	89-6240	8/2/90	AFFIRMED	E.D.Tenn.

APPENDIX F

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE

OFFICE OF THE CLERK
800 United States Courthouse
Nashville, Tennessee 37203

(615)-736-7178

DATE: 8-10-87

RE: Federal Express Corp. v. Tennessee Public Service Commission, et al.

3:87-067-0633
Judge Nixon

Enclosed is a copy of the following:

ORDER

entered on the docket by the Clerk in compliance with Rule 58 and/or Rule 79(a) of the Federal Rules of Civil Procedure on 8-10-87.

CLERK, U.S. DISTRICT COURT

BY: /s/ Doris Bush
Deputy Clerk

Copies sent to:
Marian F. Harrison
Alfred H. Knight
Don Scholes
Robert L. Baker
Jean Nelson
Val Sanford

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

FEDERAL EXPRESS CORPORATION

v.

TENNESSEE PUBLIC SERVICE COMMISSION, et al.

No. 3-87-0633

Judge Nixon

ORDER

This action came on to be heard on August 7, 1987, on the plaintiff's motion (filed August 7, 1987) for a temporary restraining order. Having considered the plaintiff's motion and the supporting papers, including the affidavit of A. Doyle Cloud, and the argument of counsel (including argument of counsel for intervenor, Purolator Courier), the Court finds that the motion should be granted.

This is an action for declaratory and injunctive relief. The Court has jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1337.

The Court finds that there is a substantial risk that irreparable injury will occur if the plaintiff is required to submit to regulation by the defendant, Public Service Commission, by filing an immediate application for certificate of convenience and necessity, pursuant to the defendants' order of June 9, 1987, because submission to the jurisdiction of the Public Service Commission by filing an application may render moot the plaintiff's constitutional and federal statutory claims, and unduly interfere with the harm the plaintiff's alleged integrated transportation system developed under federal authorization.

After due consideration, the Court finds that the plaintiff has shown the requisite likelihood of success on the merits and irreparable or substantial injury. In like fashion, the court finds that the issuance of a temporary restraining order will not cause any substantial harm to the defendants and that the public's interest will be served by doing so.

Accordingly, the defendants, their agents and employees are restrained from enforcing the order of the Tennessee Public Service Commission issued June 9, 1987, or otherwise interfering with the plaintiff's intrastate service provided solely by motor vehicle. The plaintiff's motion for a preliminary injunction is set for hearing before The Honorable John T. Nixon, United States District Judge, at 9:00 a.m. on Thursday, August 20, 1987.

It is so ORDERED.

Thomas A. Higgins
United States District Judge
8-10-87 3 pm

90-1766

Supreme Court, U.S.
FILED
MAY 15 1991
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

FEDERAL EXPRESS CORPORATION,
Petitioner,

vs.

TENNESSEE PUBLIC SERVICE COMMISSION, KEITH BISSELL, FRANK COCHRAN, and STEVEN HEWLETT,
Respondents.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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SUPPLEMENTAL APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION .

FEDERAL EXPRESS CORPORATION,
Plaintiff,

VS.

TENNESSEE PUBLIC SERVICE
COMMISSION, KEITH BISSELL, FRANK COCHRAN,
AND STEVE HEWLETT,
Defendants.

CIVIL ACTION NO. 3-87-0633

JUDGE HIGGINS

COMPLAINT

JURISDICTION

1. This action is brought pursuant to 28 U.S.C. §2201 (the federal declaratory judgment statute). This Court has jurisdiction under 28 U.S.C. §1331 and 28 U.S.C. §1337, because this case arises under several federal statutes and Constitutional provisions protecting commerce and trade, to wit: 49 U.S.C. §1305 (a)(1); 49 U.S.C. §1302(b); the Supremacy Clause of the United States Constitution, Article VI, Clause 2; and the Commerce Clause of the Constitution of the United States, Article I, Section 8, Clause 3.

PARTIES

2. The plaintiff, Federal Express Corporation, is a Delaware corporation and has its principal place of business in Memphis, Tennessee. Plaintiff provides a national small package and express transportation service, and is a certificated air carrier

operating under the grant of an all cargo authority issued by the Federal Aviation Authority under the Federal Aviation Act of 1958.

3. The defendant, Tennessee Public Service Commission, is an agency of the State of Tennessee, operating pursuant to T.C.A. §§65-1-1, *et seq*. Among the duties of the Public Service Commission are the regulation and enforcement of its statutory framework, involving certain railroads and public service companies that fall within that framework.

4. The defendants, Keith Bissell, Frank Cochran, and Steve Hewlett, are the Commissioners of the State Public Service Commission and are sued in their official capacities.

NATURE OF THE CASE

5. On or about July 2, 1986, the defendants issued a show cause order directing Federal Express to appear and show cause why it should not immediately cease and desist from providing intrastate transportation service without first obtaining a Certificate of Necessity and Convenience from the defendants pursuant to T.C.A. §65-15-107. (Show Cause Order, Exhibit A).

6. Federal Express responded, asserting that it was lawfully operating its ground transportation under the auspices of the Federal Aviation Act of 1958 which preempts state agencies from regulating the rates, routes, or services of air carriers. (Response of Federal Express Corporation to Show Cause Order, Exhibit B).

7. Hearings before an Administrative Law Judge were held, along with subsequent hearings before the defendants. A brief taking exception to the Administrative Law Judge's findings was submitted to the Commission. (Exhibit C).

8. On June 9, 1987, the defendants issued an order (Exhibit D), requiring, *inter alia:*

A. "That the transportation of property for hire by Federal Express Corporation in Tennessee intrastate commerce wholly by motor vehicle is subject to the jurisdiction of this Commission and that Federal Express Corporation must obtain a Certificate of Convenience and Necessity under T.C.A. §65-15-107 to provide such transportation."

B. "That Federal Express Corporation must file an application for a Certificate of Convenience and Necessity with the Commission within thirty days after the date of this order or else cease and desist from providing intrastate service in Tennessee wholly by motor vehicle."

9. Subsequently the defendants ordered that said Certificate of Convenience and Necessity must be filed on or before August 9, 1987. On July 23, 1987, the plaintiff requested the defendants to stay their previous order. (Exhibit E). The defendants have not yet acted upon the plaintiff's request for stay. Subsequently on August 4, 1987, the plaintiffs requested a stay from the Court of Appeals of the State of Tennessee, having previously appealed the Public Service Commission's action to that court. (exhibit F). No action has been forthcoming from the Court of Appeals and plaintiff currently faces a compliance deadline on August 9, 1987.

10. As set forth in Paragraph 2, *supra,* Federal Express is a certificated air carrier, operating under a grant of authority from the Federal Aviation Administration. As a certificated air carrier, its rates, routes and services are specifically exempted from state regulation by the 1978 Airlines Deregulation Act, 49 U.S.C. §1305(a)(1). That section reads:

> Except as provided in Paragraph 2 of this subsection, no state or political subdivision thereof and no interstate agency or other political agency of two or more states shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes,

> or services of any air carrier having authority under subchapter 4 of this act to provide air transportation.

This provision is a part of the Airlines Deregulation Act. This Act speaks directly to and supports operations such as Federal Express, by enumerating the following policies and purposes:

> 1. The encouragement and development of an expedited all-cargo air service system, provided by private enterprise, responsive to (a) the present and future needs of shippers, (b) the commerce of the United States, and (c) the national defense.
>
> 2. The encouragement and development of an integrated transportation system relying upon competitive market forces to determine the extent, variety, quality, and price of such services.
>
> 3. The provision of services without unjust discriminations, undue preferences or advantages, unfair or deceptive practices, or predatory pricing.
>
> 49 U.S.C. §1302 (b).

11. Federal Express has, pursuant to its federal authority, established itself as the leader in the small package air express industry in the United States, currently transporting in excess of 700,000 packages per night to 99% of the U.S. population. Approximately 90% of its total nightly packages pass through the Memphis "super hub" — the heart of the Federal Express system. There, approximately 2,500 employees sort packages in the short three hour "sort" window, for delivery by an appointed time the next morning in the destination city.

12. Federal Express provides express pick up and delivery to every area in Tennessee. Packages are gathered regionally in eight primary cities: Bristol, Chattanooga, Greeneville, Jackson, Knoxville, Memphis, Murfeesboro, and Nashville. The packages

gathered in the eastern portion of Tennessee are flown from Memphis to Knoxville. Since January, 1986, the packages from the central and western portions of the state go from Nashville to Memphis for sorting by either truck or aircraft, depending upon the hour of arrival in Nashville.

13. Of the packages which originate in Tennessee, approximately 88% are destined for a location outside of Tennessee. Of the packages which are destined for locations in Tennessee, approximately 89% originate from outside the state. Whether packages travel by plane or truck within the State of Tennessee, the packages are commingled. Indeed, Federal Express cannot definitely state that packages which move between almost all locations within the state are not transported in part by aircraft. The method used to transport a particular package is not determined solely by its destination; the method of transportation is determined by the time of day a package is received, the volume of packages in the Federal Express system, the weather, and other factors. No matter which method of transportation is used, it is clearly a part of Federal Express' overall national route system.

14. Federal Express' rates are unified on a national, and not local, basis. The rates are set by weight and type of service rather than by destination.

15. The defendants have ordered Federal Express to file an application for a Certificate of Convenience and Necessity pursuant to T.C.A. §65-15-107, which requires "any motor carrier" operating as a common carrier between points within a sate to acquire such a certificate.

16. As set forth in Paragraph 9, *supra,* neither the Commission nor the Court of Appeals has acted upon the plaintiff's application for a stay of the Commission's order.

17. The Commission's interpretation, together with the immediate enforcement thereof, begins the state regulation of the plaintiff, pursuant to T.C.A. §65-15-106. This statute provides:

> a. The Public Service Commission is vested with power and authority, and it shall be its duty to license, supervise and regulate every motor carrier in this state, to fix or approve the rates, fares, charges, classifications and rules and regulations pertaining thereto; to regulate and supervise the schedules, service and method of operation of same; to require the filing of annual and other reports and any other data; to require that the accounts and records of such motor carriers be kept and maintained in a manner consistent with good accounting practice; and to supervise and regulate motor carriers in all matters affecting the relationship between such motor carriers and the public.

Section (b) further provides that the Commission shall designate law enforcement officers who are charged with the duty of policing and enforcing the provisions of the chapter and who may require drivers of said motor carriers to stop for inspection.

18. Any regulation by the defendants of plaintiff's rates, routes or services under T.C.A. §65-15-106 through the current interpretation by the defendants will directly impact plaintiff's rates, routes, and services and will interfere with plaintiff's interstate and intrastate air and ground transportation network nationwide.

CONTENTIONS

19. The plaintiff contends that the required filing of the Application for Certification of Convenience and Necessity and the concomitant beginning of regulation and enforcement by the defendants of any of plaintiff's shipments in this state is in direct contravention of federal statute and Constitutional provisions because:

a. State regulation is expressly preempted under Section 105 of the Federal Aviation Act and the Supremacy Clause of the United State Constitution, 49 U.S.C. §1305(a)(1), and U.S. Constitution, Article VI, Clause 2.

b. Such regulation also unduly burdens interstate commerce and therefore contravenes the Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3.

20. Any regulation of Federal Express' intrastate transportation of parcels will directly and adversely affect its national integrated transportation system, in contravention of the Airline Deregulation Act, and the statutes and Constitutional provisions set forth above.

21. The plaintiff asserts that irreparable injury will occur if it is required to submit to regulation by the Public Service Commission by filing an immediate Application for Certification of Convenience and Necessity because:

a. Such filing may moot the issues now on appeal to the Court of Appeals and the plaintiff's federal statutory and Constitutional concerns may never be heard; and

b. Submission to the jurisdiction of the Public Service Commission by filing such a Certificate initiates regulation and constitutes submission to the claimed jurisdiction of the Commission over this activity. Regulation by the Commission will unduly interfere with and harm the integrated transportation system developed by Federal Express under federal authorization.

RELIEF

22. The plaintiff respectfully requests that the following relief be granted:

1. That the Court issue a temporary restraining order and a preliminary injunction preventing the defendants from enforcing the order of June 9, 1987, pending a determination of the issues in this case.

2. That the Court enter a judgment declaring the efforts of the Public Service Commission to bring Federal Express within its jurisdiction and to regulate it as a motor carrier are unconstitutional and void, such regulation being preempted by specific federal statute, violative of the Supremacy Clause of the United States Constitution and unduly burdensome on interstate commerce under the Commerce Clause of the United States Constitution.

3. For such other general relief as may be appropriate.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX B

BEFORE THE TENNESSEE PUBLIC SERVICE COMMISSION
Nashville, Tennessee

June 9, 1987

IN RE: SHOW CAUSE ORDER AGAINST FEDERAL EXPRESS CORPORATION

DOCKET NO. SMC-977

ORDER

This matter is before the Tennessee Public Service Commission upon its own motion. On July 2, 1986 the Commission entered a show cause order against Federal Express Corporation ordering it to appear and show cause why it should not immediately cease and desist from providing intrastate ground transportation service as a common carrier without first obtaining a certificate of convenience and necessity from the Commission pursuant to T.C.A. §65-15-107.

This matter was set for hearing and heard before Mack H. Cherry, Administrative Judge, on July 23 and September 24, 1986 at the Commission Hearing Room in Nashville, Tennessee. On February 24, 1987 the Administrative Judge issued his Initial Order. The Administrative Judge concluded that Federal Express needs a certificate of convenience and necessity from the Commission to provide intrastate service in Tennessee solely by motor vehicle as a common carrier.

By Order dated February 24, 1987, the Commission notified all parties in this proceeding that it intended to review all issues raised in the record of this proceeding before the Administrative Judge. Federal Express filed a brief with the Commission noting its exceptions to the Initial Order. Purolator Courier Corporation and the Commission Staff filed reply briefs to the brief submitted

by Federal Express. The Commission heard oral argument from all the parties on the issues in this case.

The Commission considered this matter at its Commission Conference on May 7, 1987. After consideration of the entire record, including the briefs and arguments of the parties, the Commission concludes that Federal Express must obtain a certificate of convenience and necessity pursuant to T.C.A. §65-15-107 to provide intrastate service in Tennessee solely by motor vehicle as a common carrier. In support of its decision, the Commission makes the following findings of fact and conclusions of law.

FACTS

The facts in this case are not in dispute. Federal Express provides a small package overnight delivery service between virtually all points in the United States. This small package overnight delivery service includes traffic moving *between points in the state of Tennessee*. Federal Express provides service to 100% of Tennessee's population.

Federal Express operates a hub and spoke system. Its central hub for sorting packages is in Memphis, Tennessee. Approximately 90% of all shipments transported by Federal Express move through the central hub in Memphis. The remaining 10% of its shipments move through smaller regional hubs located in Oakland, California and Newark, New Jersey. Federal Express uses both air transportation and ground transportation to transport shipments through its sort facility. More than 90% of its shipments are moved by aircraft at some point between origin and destination.

Federal Express holds a certificate of public convenience and necessity to provide air transportation from the Civil Aeronautics Board (CAB). Under this authority, Federal Express operates a fleet of fifty-three Boeing 727 aircraft and sixteen DC-10

aircraft. In addition, Federal Express utilizes a fleet of feeder aircraft which are operated by local operators for the exclusive use of Federal Express. Federal Express operates a motor vehicle fleet of more than 16,000 vehicles nationwide. Federal Express holds a certificate of convenience and necessity from the Interstate Commerce Commission to provide ground transportation in interstate commerce.

Federal Express provides service between points in Tennessee by using eight host cities.[1/] Packages picked up by motor vehicle from shippers in all areas of Tennessee are first brought to a Federal Express facility in each host city. Packages are then moved from these eight host cities to the Federal Express hub in Memphis. Packages to be delivered to a point in Tennessee are transported from Memphis to the host city nearest the destination city. Packages are then delivered by motor vehicle to their final destination. Shipments between some of these host cities and Memphis are transported by motor vehicle only. Therefore, no part of some Tennessee intrastate moves involves air transportation from origin to destination. For example, shipments between Jackson and Memphis are moved by truck. The majority of shipments between Nashville and Memphis are moved by truck. Only late shipments are moved from Nashville to Memphis by plane.

Federal Express admits that some Tennessee intrastate shipments are transported from origin to destination without using any aircraft. Mr. Doyle Cloud, Vice President of Government and Regulatory Affairs for Federal Express, testified that a shipment tendered for delivery in Nashville early in the day bound for Pulaski would move solely by motor vehicle. The shipment would be picked up from the shipper by a courier in a

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[1/] Bristol, Chattanooga, Greeneville, Jackson, Knoxville, Memphis, Murfeesboro, and Nashville.

motor vehicle in Nashville. The shipment would be transported from Nashville to Memphis by motor vehicle for sorting. After the sort the shipment would return to Nashville by motor vehicle. The shipment would then be delivered either directly from Nashville to Pulaski by a courier in a motor vehicle, or the shipment would be moved from Nashville on to Murfreesboro by motor vehicle then delivered from Murfreesboro to Pulaski by courier in a motor vehicle. Service between many points in central and western Tennessee are served using ground transportation only.

Mr. Cloud indicated that approximately half of Federal Express' average daily Tennessee intrastate shipments move solely by motor vehicle. Federal Express averages 1085 Tennessee intrastate shipments per day. Of the approximate 500 shipments that move within Tennessee per day solely by ground transportation, about 300 (60%) of the shipments are communication items (documents) and the remaining 200 (40%) are hard goods. These shipments within Tennessee moving solely by ground transportation constitute less than 6% of the Tennessee shipment volume and less than .01% of Federal Express' total national volume.

ISSUES

The Tennessee Motor Carrier Act (hereinafter the Act) defines a motor carrier as follows:

> "Motor carrier," when used in this chapter, means any person, firm, partnership, association, joint stock company, corporation, lessee, trustee, or receiver appointed by any court whatsoever, operating any motor vehicle with or without semitrailers attached, upon any public highway for the transportation of persons or property or both or for providing or furnishing such transportation service, for hire as a common carrier. T.C.A. §65-15-102(c).

Federal Express operates motor vehicles over the public highways of Tennessee for the transportation of property for hire as a common carrier. Therefore, Federal Express is a motor carrier under the Act.

The Act further provides that a motor carrier cannot lawfully operate as a common carrier between points in Tennessee without first obtaining a certificate of convenience and necessity. T.C.A. §65-15-107. The Commission has never issued Federal Express a certificate of convenience and necessity.

Nevertheless, Federal Express asserts that its intrastate operations are lawful. In support of its position, Federal Express makes four arguments:

(1) Federal Express contends that section 105 of the Airline Deregulation Act of 1978, 49 U.S.C. §1305, expressly preempts a state from regulating the rates, routes, or services of a certificated air carrier.

(2) Federal Express contends that state regulation of the transportation activities of certificated air carriers is implicitly preempted under the Supremacy Clause because it frustrates an essential purpose of Congress, it interferes in an area requiring national uniformity, and it unreasonably burdens interstate commerce.

(3) Federal Express contends that because the United States Postal Service has absolute authority over the transportation of mail under its constitutional grant, the promulgation of regulations suspending the private express statutes preempts state regulatory authority over intrastate ground transportation by entities, like Federal Express, who operate under the suspension.

(4) Federal Express contends that the intrastate surface transportation of mail by Federal Express under the suspension of the federal postal monopoly constitutes business conducted for the government of the United States and is excepted from state

regulation under section 65-15-105 of the Tennessee Code Annotated.

ISSUE I

Section 105 (a) of the Airline Deregulation Act of 1978, 49 U.S.C. § 1305 (a) expressly preempts state economic regulation of air carriers. This section provides:

(a) Preemption

(1) Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

(2) Except with respect to air transportation (other than charter air transportation) provided pursuant to a certificate issued by the Board under section 1371 of this title, the provisions of paragraph (1) of this subsection shall not apply to any transportation by air of persons, property, or mail conducted wholly within the state of Alaska.

Federal Express is an air carrier with authority under subchapter IV of Title 49 of the United States Code. Federal Express argues therefore, that the Tennessee Public Service Commission is expressly preempted from regulating its rates, routes, and services. Federal Express' argument assumes that Congress intended for section 105 to preempt the states from regulating all transportation services provided solely by motor vehicle. The Commission concludes that Congress expressed no such intent.

A. *The Plain Language of Section 105 Shows that Congress Only Intended to Preempt the Air Transportation Rates, Routes, and Services of Air Carriers.*

Section 105 must be read in the context of the statute as a whole. *United States v. Morton,* 467 U.S. 822, 828 104 S. Ct. 2769, 2773, 81 L.Ed. 2d 680, 688 (1984). Thus, in interpreting a statute one should not look to a particular word or phrase in isolation, but should consider it in connection with the whole statute and related statutes, and the objects and policy of the law, in order to give it such a construction as will carry into effect the will or intent of Congress. *Kokoszka v. Belford,* 417 U.S. 642, 650, 94 S. Ct. 2431, 2436, 41 L.Ed. 2d 374, 381 (1974).

Therefore, the proper construction of section 105 requires consideration of the whole statute of which it is a part. Section 105 is a part of Subchapter 1 of Chapter 20 of Title 49 of the United States Code. Chapter 20 is entitled "Federal Aviation Program." Nowhere in that chapter is any intent expressed to deal in any way with the regulation of ground transportation.

Moreover, the terms "air carrier" and "air transportation" used in section 105 limit the scope of the preemption. Congress defines an air carrier as "any citizen of the United States who undertakes... to engage in air transportation." 49 U.S.C. §1301(3). Air transportation means "interstate, overseas, or foreign air transportation or the transportation of mail by aircraft." *Id.* at §1310(10). Therefore, section 105 preempts state regulation of the rates, routes, and services of Federal Express as an air carrier which by definition encompasses only air transportation. Section 105 says nothing about the rates, routes, or services of Federal Express as a motor carrier, rail carrier, or any other type of transportation carrier.

Federal Express' interpretation of section 105 extended to its logical conclusion produces absurd results. Under Federal Express' interpretation, a motor carrier could circumvent all intrastate

regulation of its motor carrier activities in every state by simply obtaining authority to operate as an air carrier between two specific points. Once the motor carrier obtained the status of an air carrier, the motor carrier would simply argue that all intrastate regulation of its motor carrier activities have been preempted by section 105. A motor carrier would be able to avoid all intrastate regulation in every state by becoming an "air carrier." Clearly, Congress did not intend that section 105 produce this result.

Federal Express argues that courts have consistently preempted any state regulation affecting the rates, routes, or services of air carriers under the express language of section 105. Each case cited by Federal Express, however, shows that the state regulations preempted in these cases attempted to regulate the air transportation services provided by an air carrier. No case has been cited by Federal Express which suggests that section 105 preempts the states from regulating other transportation services provided by an air carrier. On the contrary the language of these cases supports the position that only the regulation of air transportation rates, routes, or services is preempted. In *Hingson v. Pacific S.W. Airlines,* 743 F. 2d 1408 (9th Cir. 1984), a claim against an air carrier under a California statute prohibiting discrimination against the handicapped by common carriers was preempted as relating to services of an air carrier, but a claim for intentional infliction of emotional distress was not preempted. In *Hiawatha Aviation of Rochester, Inc. v. Minn. Dept. of Health,* 389 N.W. 2d 507 (Minn. 1986), the Minnesota Supreme Court held that section 105 preempted state regulation of entry into the field of air ambulance service, but did not preempt state regulation of the delivery of medical services such as staffing requirements and standards for maintenance of sanitary conditions by such an air ambulance.

B. *The Legislative History of Section 105 Supports the Position That Only Air Transportation is Within the Scope of the Preemption.*

Nothing in the legislative history of the Airline Deregulation Act of 1978 (hereinafter Airline Deregulation Act) suggests that Congress intended for section 105 to preempt state regulatory commissions from regulating the intrastate motor carrier operations of an air carrier. No mention of motor carriers or of the preemption of transportation by motor vehicles appears in the legislative history. The legislative history deals only with various aspects of air transportation.

The House Report on the Airline Deregulation Act indicates that its purpose was "to amend the Federal Aviation Act of 1958 to improve air service and provide flexibility in air fares." H.R. Rep. No. 95-1211, 95th Cong. 2d Sess. 1, *represented in* [1978] *U.S. Code Cong. & Ad. News* 3737. One of the ways Congress sought to achieve this goal was to remove the external constraints of both state and federal government route and rate regulation to allow market forces to determine the variety, quality, and price of an integrated air transportation system.

Prior to the enactment of the Airline Deregulation Act, carriers providing interstate air transportation services to the public were subject to comprehensive economic regulation by the CAB. No one could provide interstate air transportation services without first obtaining a certificate of public convenience and necessity from the CAB. The rates and services provided by certificated air carriers were subject to regulation by the CAB.[2/] Prior to 1978 many state regulatory commission had established economic

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[2/]Under 49 U.S.C. § 1386(b)(1), the CAB had authority to exempt an air carrier or a class of air carriers from economic omic regulation when the CAB found that such regulation was not in the public interest.

regulatory schemes for intrastate airlines similar to the federal economic regulatory scheme for interstate airlines. In addition, these state regulatory commissions regulated the intrastate activities of CAB-certificated or exempt airlines. *See Hughes Air Corp. v. Public Utilities Commission*, 644 F.2d 1'334, 1336 (9th Cir. 1981). The Tennessee Bureau of Aeronautics, which is part of the Tennessee Department of Transportation, is the state agency in Tennessee which regulates intrastate airlines. T.C.A. § 42-2101 *et seq.*

Federal Express argues that because its air and ground services are so inextricably intertwined, Congress intended section 105 to preempt state regulation of the ground services of a carrier providing air transportation services under the authority of the CAB. Congress never expressed such an intent. The House Public Works and Transportation Committee's discussion of Section 105 clearly shows that preemption was aimed at state regulation of air transportation:

> Existing law contains no specific provision on the jurisdiction of the States and the Federal Government over airlines which provide both intrastate and interstate service. The lack of specific provisions has created uncertainties and conflicts, including situations in which carriers have been required to charge different fares for passengers traveling between two cities, depending on whether these passengers were interstate passengers whose fares are regulated by the CAB, or intrastate passengers, whose fare is regulated by a State.
>
> H.R. 12611 will prevent conflicts and inconsistent regulations by providing that when a carrier operates under authority granted pursuant to title IV of the Federal Aviation Act, no State may regulate the carrier's routes, rates or services. The bill furthers provides that if a carrier was primarily an intrastate carrier on August 1, 1977, and

> subsequently receives authority from CAB, its State authority must be included in its CAB certificate until the CAB modifies the certificate.
>
> The bill also eliminates Federal jurisdiction over certain service which is essentially intrastate in nature. Under existing law, CAB has jurisdiction over air service between two cities in a State if the aircraft passes over places outside the State. H.R. 12611 provides that service between two cities in a State is not subject to CAB jurisdiction solely because the aircraft passes over places outside of the State. This provision does not apply to flights between the Hawaiian Islands which will continue to be regulated by the CAB.

H.R. Rep. No. 95-1211, 95th Cong. 2d Sess. 15-16, *reprinted in* [1978] *U.S. Code Cong. & Ad. News* 3737, 3751-52.

In enacting the Airline Deregulation Act, Congress only sought to remove regulatory constraints placed upon air transportation carriers by the CAB and by state regulatory commission which regulated the intrastate activities of CAB-certificated and exempt carriers. Congress did not attempt to remove regulatory constraints placed upon air carriers by other federal or state agencies which regulated other modes of transportation provided by air carriers. For example, until 1980 the motor carrier segment of some interstate movements by air carriers which required movement both by aircraft and by motor vehicle from origin to destination was still subject to regulation by the Interstate Commerce Commission (ICC).[3/] The Airline Deregu-

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[3/] Before 1980 the incidental-to-air transportation exemption from ICC regulation was limited to bona fide collection, delivery, or transfer service. In addition, ICC regulations limited the exemption to geographical areas surrounding airports and cities adjacent to those airports. H.R. Rep. No. 96-1069, 96th Cong. 2d Sess. 19, *reprinted in* [1980] *U.S. Code Cong. & Ad. News* 2283, 2301.

lation Act did not exempt the motor carrier segment of such moves by Federal Express or any other air carrier from ICC regulation. The motor carrier segment of such an interstate move did not become exempt from ICC regulation until Congress enacted the Motor Carrier Act of 1980. Moreover, Federal Express currently holds a certificate of convenience and necessity from the ICC. If Congress intended for the Airline Deregulation Act to truly integrate the air and ground services of an air carrier, why does Federal Express need an ICC certificate to engage in the interstate surface transportation of goods? The answer is clear. The Airline Deregulation Act sought to reduce regulatory restraints on air transportation provided by an air carrier and not other regulations governing other types of transportation services.

Likewise, section 105 of the Airline Deregulation Act only preempts state regulatory commissions from regulating the intrastate air rates, routes, and services of air carriers with authority from the CAB. This section does not preempt state regulatory commissions from regulating other modes of transportation in which an air carrier might engage.

C. *The Historic Structure of The Division of Regulatory Responsibility For Ground and Air Transportation Supports a Finding that Congress did not Intend to Affect Ground Transportation in Enacting Section 105.*

Historically, air transportation and ground transportation have been regulated by different federal agencies under different laws. The Civil Aeronautics Board (CAB) regulated the air transportation industry. The Interstate Commerce Commission (ICC) regulates the ground transportation industry. In addition, the regulatory responsibility of air and ground transportation has been divided between federal and state governments.

The Motor Carrier Act of 1980 (hereinafter Motor Carrier Act) specifically and expressly allocates regulatory responsibility for ground transportation by motor vehicle. In the Motor Carrier Act, Congress reserved to the states the power to regulate intrastate transportation provided by a motor carrier with exceptions not material here. 49 U.S.C. § 10521(b)(1). No provision of the Motor Carrier Act purports to preempt the jurisdiction of states to regulate shipments moving wholly by motor vehicle in intrastate commerce. If Congress intended to preempt state regulation of motor carrier operations, the Motor Carrier Act would have been a logical place to express that intention.

In the Motor Carrier Act, Congress exempt from ICC jurisdiction the transportation of property in interstate commerce performed as part of a continuous movement which, prior or subsequent to such part of the continuous movement, has been or will be transported by an air carrier. 49 U.S.C. § 10526(a)(8)(B). In the absence of this exemption language, the interstate ground transportation of air freight would be subject to ICC regulation. H.R. Rep. No. 96-1069, 96th Cong. 2d Sess. 19 (1980), *reprinted in* [1980] *U.S. Code Cong. & Ad. News,* 2283, 2301. In the legislative history of the Motor Carrier Act, Congress stated that it was adopting the exemption from ICC jurisdiction concerning continuous ex-air movements "to bring it into line with what the Congress has done on air cargo movements. Since the transportation of air cargo is now exempt from Federal economic regulation, the Committee believes that it makes sense to exempt the entire movement, including the motor carrier transportation portion." *Id.* Therefore, if Congress had intended to exempt intrastate ground movements by air carriers from regulation, it would have said so. The fact that it did not say so confirms no such intention existed.

Federal preemption of state regulatory power in the field of commerce is not favored in the absence of "persuasive reasons" - either that Congress has unmistakably so ordained or the nature

of the subject matter permits no other conclusion. *Chicago & N.W. Transp. v. Kalo Brick & Tile*, 450 U.S. 311, 317, 101 S. Ct. 1124, 1120, 67 L.Ed. 2d 258 (1981).

Congress has expressly spoken on the subject of state regulation of intrastate motor carrier operations. In the Interstate Commerce Act, Congress expressly preserves the dual system of motor carrier regulation, reserving to the states the power to regulate intrastate transportation provided by a motor carrier except as otherwise specifically provided therein. 49 U.S.C. § 10521. Under the Interstate Commerce Act, a motor carrier is defined as a "person holding itself out to the general public to provide motor vehicle transportation for compensation over regular or irregular routes, or both." 49 U.S.C. § 10102(14). In holding itself out to the general public to provide motor vehicle transportation for compensation, Federal Express is clearly a motor common carrier. Nothing in the Interstate Commerce Act preempts state regulation of the intrastate activities of Federal Express when it operates as a motor common carrier. Therefore, Congress, far from expressing a clear and manifest intent to preempt state regulation of Federal Express when it chooses to operate as a motor common carrier wholly in intrastate commerce, has on the contrary evidenced a clear and manifest intent that state regulation should continue.

D. *The Efforts of Federal Express to Have Section 105 Amended to Accomplish What it Here Argues has been Accomplished Undercut its Contentions as to Preemption.*

Mr. Armando Labrada, Vice President and Associate General Counsel for Purolator, testified that Federal Express has initiated a proposal to Congress to preempt state regulation of intrastate surface movements by air carriers by amending section 105. In its trial brief Purolator submitted a recent article from *The Vanderbilt Lawyer* written by Kenneth R. Masterson, Vice

President and General Counsel of Federal Express. In this article Mr. Masterson argues that,

> The logical conclusion is clear: federal preemption of state regulations which purport to economically regulate intrastate surface transportation performed by express package carriers is necessary at this time.

If Federal Express believes that section 105 preempts state regulation of intrastate ground transportation by air carriers, then why is Federal Express seeking to amend section 105 to achieve this same goal? The answer is clear. Section 105 as it currently exists does not preempt such state regulation.

ISSUE 2

Federal Express argues that state regulation of all transportation provided by certificated air carriers should be implied because (i) state regulation allegedly frustrates Congressional purposes, ii) national uniformity is allegedly required, and (iii) state regulation allegedly unreasonably burdens interstate commerce.

"The critical question in any preemption analysis is always whether Congress intended that federal regulation supersede state law." *Louisiana Public Service Commission v. F.C.C.*, __U.S.__, 106 S. Ct. 1890, 1899, 90 L. Ed. 2d 369, 382 (1986). The intent of Congress to preempt state regulation can be either express or implied. When Congress expressly states its intent to preempt state regulation, as it did in section 105, one need not look beyond the express preemptive language of the statute to determine whether federal preemption has occurred. *See Aloha Airlines, Inc. v. Director of Taxation of Hawaii,* 464 U.S. 7, 12-13, 104 S. Ct. 291, 294, 78 L. Ed. 2d 10, 15 (1983). In *Aloha* the United States Supreme Court noted that rules developed by the Court in cases involving implied preemption have little application in cases where federal preemption is explicit. *Id.* at 12 n.5, 104 S. Ct. at 294 n.5, 78 L. Ed. 2d at 15 n.5.

In this case Federal Express argues that the preemption of state regulation of all transportation of air carriers is implied. To support its argument Federal Express uses rules developed in cases involving implied preemption. The preemption of state regulation under section 105, however, is express not implied. Therefore, the rules developed in cases involving implied preemption used by Federal Express in this case simply do not apply. Congress clearly stated its preemptive intent in the statute. The Commission does not have to look elsewhere to find the preemptive intent of Congress. When one determines that state regulation has not been preempted by a statute expressly providing for such preemption, the preemption inquiry ends. One does not continue to look for an implied intent to preempt from examining the purpose behind the enactment of a particular statute.

Even if one uses the rules developed in cases of implied preemption in this case, no federal preemption of state regulation of the motor carrier operations of Federal Express would be found. Nothing in the language of or legislative history of the Airline Deregulation Act or any other act of Congress indicates that Congress intended to change the policies governing the regulation of motor common carriers as expressed in the Interstate Commerce Act. The Airline Deregulation Act is concerned with air transportation and air carriers not motor carrier transportation and motor common carriers. In the Airline Deregulation Act, Congress did clearly preempt state regulation of the rates, routes, and services of air carriers, but Congress in no way expressed any intent to preempt state regulation of rates, routes, and services of motor common carriers. Therefore, so long as Federal Express chooses to provide air transportation as an air carrier, state regulation of its rates, routes, and services is clearly preempted. In this case, however, Federal Express has chosen to enter an entirely separate field and to conduct operations as a ;motor common carrier. In so doing Federal Express, by its own acts, leaves behind its status as an air carrier and instead becomes

a motor common carrier as that term is defined in both the Interstate Commerce Act and the Tennessee Motor Carrier Act. As a motor common carrier Federal Express is subject to the same regulatory standards as any other motor common carrier. Nowhere has Congress indicated any intent to allow air carriers to become motor common carriers without being subject to the same regulations as other motor common carriers. Therefore, state regulation of transportation performed solely by motor vehicle by Federal Express does not frustrate any Congressional purpose. Indeed, the position taken by Federal Express would frustrate the Congressional purpose provided in the Interstate Commerce Act to continue state regulation of intrastate ground transportation by motor vehicle.

The contentions of Federal Express as to some supposed Congressional policy of national uniformity are likewise based on the same erroneous assumption that operations as a motor common carrier are somehow included in a statute dealing solely with air carriers and air transportation. The Congressional policy as to the operation of motor common carriers is stated in the Interstate Commerce Act and under that Act state regulation of intrastate motor common carrier operations continues.

Likewise, in its arguments based on the commerce clause, Federal Express simply ignores the fact that it is operating as a motor common carrier wholly in Tennessee intrastate commerce in the subject operations, and ignores the law that Congress has left the regulation of such motor common carrier operations to the states. Where Congress has spoken, as it has here, commerce clause arguments have no relevance. *Prudential Insurance Co. v. Benjamin,* 328 U.S. 408, 66 S. Ct. 1142, 90 L. Ed. 1342 (1946).

ISSUE 3

Under the private express statutes, the United States Postal Service (USPS) has a monopoly over the carriage of mail. 18

U.S.C. § 11696, 39 U.S.C. § 601. Congress, however, gave the USPS the power to suspend the operation of the private express statutes when the public interest so requires. 39 U.S.C. § 601(b). The USPS has suspended the operation of the private express statutes when certain conditions are met. 39 C.F.R. §§310, 320. Federal Express states that it transports documents and other items which constitute letters and mail under the suspension provided for in 39 C.F.R. § 320.6 (c). This section suspends the private express statutes for extremely urgent letters and provides,

> a letter is extremely urgent and is covered by the suspension if the amount paid for private carriage of the letter is at least three dollars or twice the applicable U.S. Postage for First Class mail (indicating priority mail) whichever is the greater.

Federal Express contends that carriers operating under the suspension operate under the absolute authority of the USPS to transport letters which preempts state regulatory authority over the transportation of letters in intrastate commerce by motor vehicle.

Federal Express transports hard goods as well as communications products in intrastate commerce by motor vehicle in Tennessee. The transportation of hard goods does not fall within the preemption argument being made by Federal Express concerning the transportation of letters. Therefore, the Commission need not decide this issue to determine whether Federal Express must obtain authority to provide intrastate ground transportation in Tennessee. Nevertheless, the Commission will address this issue.

Federal Express cited several cases to support its position. None of these cases, however, relate to a carrier operating under the USPS's suspension of the private express statutes. In some of the cases cited, the courts have held that local or state regulations interfering with the functioning of the USPS were preempted.

Johnson v. Maryland, 254 U.S. 51, 41 S. Ct. 16, 65 L. Ed. 126 (1920) (federal postal regulations requiring the fitness and competence of post office drivers preempts state driver licensing requirements); *United States v. City of Pittsburgh*, 661 F. 2d 783 (9th Cir. 1981) (local ordinance prohibiting postal carriers from crossing lawns without express consent held unconstitutional under Supremacy Clause); *Stewart v. United States Postal Service*, 508 F. Supp. 112 (N.D. Cal. 1980) (USPS not required to comply with local zoning ordinance where compliance would hamper the functions of the USPS). In the rest of the cases cited, the courts held that persons were in violation of the private express statutes. *Associated Third Class Mail Users v. United States Postal Service*, 600 F. 2d 824 (D.C. Cir. 1979) advertising circulars addressed to particular persons or location were letters under the private express statutes and thus under postal monopoly); *United States Postal Service v. Brennan*, 574 F. 2d 712 (2d Cir. 1978), *cert. denied*, 439 U.S. 1115, 99 S. Ct. 1018, 59 L. Ed. 2d 73 (1979) (same day delivery of letters for compensation by private party violated private express statutes); *United States v. Black*, 569 F. 2d 1111(10th Cir. 1978) (conveyance of letters by private party between two cities between which the USPS had established regular postal routes violated private express statutes).

Federal Express has cited no case which supports its contention that a person operating under the suspension of the private express statutes is clothed with the same absolute authority over the transportation of letters as the USPS so as to preempt state regulation. Federal Express has introduced no evidence which demonstrates that a carrier operating under the suspension is in fact operating within the authority of the USPS. To the contrary, Federal Express is not required to obtain any certificate or permit from the USPS to transport extremely urgent letters pursuant to the suspension under 39 C.F.R. § 320.6. When a carrier wants to begin providing the transportation of extremely urgent letters under this suspension, it simply does so. The USPS does not

exercise any direct control over the transportation service provided by a carrier operating within the bounds of the suspension. The USPS only has the power to revoke the suspension of a carrier when the terms of the suspension in 39 C.F.R. § 320.6 have been violated. The USPS also has the power to conduct an inspection and audit of a carrier operating under the suspension to determine whether the terms of the suspension have been violated. Moreover, the USPS transports extremely urgent letters in competition with Federal Express through its Express Mail service.

Therefore, Federal Express does not stand in the same stead as the USPS with state regulatory authority over the intrastate transportation of letters. Federal Express has no monopoly over the transportation of extremely urgent letters. Any carrier which meets the conditions in 39 C.F.R. § 320.6 may transport extremely urgent letters under the suspension. Requiring Federal Express to obtain a certificate from the Commission will not impede or hamper the functions of the USPS. Other carriers, such as Purolator, transport extremely urgent letters in intrastate commerce under authority issued by this Commission. Because Federal Express is not clothed with the same absolute authority over the transportation of letters as the USPS, the preemption of state regulation of the transportation of letters applicable to the USPS is not applicable to Federal Express.

ISSUE 4

Federal Express has argued that the absolute authority of the USPS over the transportation of letters extends to Federal Express under the suspension of the private express statutes. As such, Federal Express contends that its transportation of letters is conducting business for the government of the United States.

Section 65-15-105 of the Tennessee Code Annotated provides:

> *Interstate commerce and government business excepted.* – Neither this chapter nor any provision thereof, shall be construed to regulate or apply to commerce with foreign nations, or commerce among the several states of the United States or to business conducted for the government of the United States. except insofar as the same may be permitted under the constitution of the United States and the acts of Congress.

Therefore, Federal Express argues that its transportation of letters is excepted from Commission regulation under T.C.A. § 65-15-105. This argument is without merit.

The Commission has previously found that Federal Express does not stand in the same stead in regard to the public and to state regulatory authority as the USPS in the transportation of letters. The transportation of letters by Federal Express cannot be considered the conduct of business for the government of the United States for the reasons previously stated.

The Commission has considered the scope of the government business exception in recent years. In *In Re: Ford L. Wright & Marie A. Wright, d/b/a All American Moving & Storage for Declaratory Ruling*, Docket No. SMC-882 (June 7, 1982), the Commission had to decide whether household goods movers who operated pursuant to contracts with the United States military came within the government business exception in T.C.A. § 65-15-105. The Commission concluded that the transportation provided by the household goods movers did not come within the government business exception. The Commission found that T.C.A. § 65-15-105 was essentially a codification of the doctrine of federal preemption. The Commission found no federal law which was inconsistent with requiring the household goods movers to obtain a contract hauler's permits. Therefore, the Commission concluded that the transportation provided by the household goods movers was "permitted under the Constitution of the United States and the Acts of Congress."

The Commission has previously concluded that federal law does not preempt the states from regulating the transportation of letters by carriers operating under the suspension of the private express statutes. Therefore, the transportation of extremely urgent letters by Federal Express is permitted under the Constitution and the acts of Congress and is not excepted from regulation by the Commission under T.C.A. §65-15-105.

CONCLUSION

Federal Express admits that it transports documents and packages for hire between points in Tennessee solely by motor vehicle. Under T.C.A. § 65-15-102(c), this activity makes Federal Express a motor carrier. Therefore, under T.C.A. § 65-15-107, Federal Express must obtain a certificate of convenience and necessity to transport this property for hire between points in Tennessee by motor vehicle.

Federal Express argues that the Commission's regulation of its intrastate ground transportation has been preempted by section 105 of the Airline Deregulation Act of 1978. Neither the plain language of section 105 nor its legislative history supports this conclusion. The historical division of regulatory responsibility for air transportation and ground transportation does not support a finding of preemption. Federal Express is seeking to have Congress amend section 105 to do what Federal Express purports section 105 already does: preempt the states from regulating intrastate shipments by an air carrier moved wholly by motor vehicle. Therefore, the Commission concludes that section 105 does not preempt this Commission from regulating the intrastate shipments of Federal Express moved wholly by motor vehicle.

Federal Express argues that the preemption of this Commission's regulation of its transportation provided solely by motor vehicle in intrastate commerce is implied. The Commis-

sion finds that an implied preemption analysis is not appropriate in this case. Congress expressly stated its intent to preempt state regulation in section 105. Therefore, no implied preemption analysis is necessary to determine Congress' intent. Even under an implied preemption analysis, no preemption would be found. Nothing in the language of or the legislative history of the Airline Deregulation Act or any other act of Congress indicates that Congress intended for air carriers engaged in transportation wholly by motor vehicle within a state to be exempt from state regulation.

Federal Express contends that it transports extremely urgent letters in intrastate commerce under a suspension of the private express statutes. Federal Express argues that by operating under the suspension it operates under the absolute authority of the USPS which preempts state regulatory authority over the transportation of letters. Federal Express cites no case law to directly support this proportion. The USPS has little control over the transportation provided by Federal Express or other carriers under the suspension. Therefore, the Commission concludes that the preemption of state regulation of the transportation of letters by the USPS does not extend to the transportation of extremely urgent letters by carriers like Federal Express operating under the suspension.

Finally, Federal Express contends that because it transports letters pursuant to the absolute authority of the USPS, Federal Express is conducting business for the United States which is excepted from Commission regulation under T.C.A. § 65-15-105. This section however, simply codifies the doctrine of federal preemption. The Commission has previously concluded that it has not been preempted from regulating the intrastate shipments of Federal Express by motor vehicle. Therefore, T.C.A. § 65-15-105 does not except these shipments from Commission regulation.

Federal Express has failed to carry its burden of proving that it is not subject to Commission regulation and that it should not be required to obtain a certificate of convenience and necessity before providing intrastate service in Tennessee as a common carrier by motor vehicle. Therefore, Federal Express must obtain a certificate of convenience and necessity pursuant to T.CA. § 65-15-107 to provide intrastate service within Tennessee wholly by motor vehicle.

The Commission recognizes that Federal Express has many existing Tennessee customers which currently use Federal Express to make Tennessee intrastate shipments. Rather than disrupt these existing operations by immediately issuing a cease and desist order, the Commission hereby directs Federal Express to file an application for a certificate of convenience and necessity within thirty (30) days of the date of this Order. The Commission will not attempt to interfere with Federal Express' Tennessee intrastate service provided solely by motor vehicle pending a decision on Federal Express' application, provided such application is filed within thirty (30) days of the date of this Order and provided Federal Express expeditiously prosecutes its application.

IT IS THEREFORE ORDERED:

1. That the transportation of property for hire by Federal Express Corporation in Tennessee intrastate commerce wholly by motor vehicle is subject to the jurisdiction of this Commission and that Federal Express Corporation must obtain a certificate of convenience and necessity under T.C.A. § 65-15-107 to provide such transportation.

2. That Federal Express Corporation must file an application for a certificate of convenience and necessity with the Commission within thirty (30) days of the date of this Order or else cease and desist from providing intrastate service in Tennessee wholly by motor vehicle.

3. That any party aggrieved with the Commission's decision in this matter may file a Petition for Reconsideration with the Commission within ten (10) days from and after the date of this Order.

4. That any party aggrieved with the Commission's decision in this matter has the right of judicial review by filing a Petition for Review in the Tennessee Court of Appeals, Middle Section, within sixty (60) days from and after the date of this Order.

/s/ Frank D. Cochran
CHAIRMAN

/s/ Keith Bissell
COMMISSIONER

/s/ Steven Hewlett
COMMISSIONER

ATTEST
/s/ Illegible
EXECUTIVE DIRECTOR

SUPPLEMENTAL APPENDIX C

IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

No. _____

FEDERAL EXPRESS CORPORATION,
Petitioner,

vs.

TENNESSEE PUBLIC SERVICE
COMMISSION, et al.,
Respondents.

ORDER

The application of Federal Express Corporation for a stay of a final order entered by the Public Service Commission on June 9, 1987, was heard by the undersigned on August 6, 1987.

Upon consideration of said application, memorandum in support thereof, exhibits thereto, responses of the Public Service Commission and Purolator Courier Corporation, and argument of counsel, it has been determined that said application should be denied, but on condition that compliance with said order of the Public Service commission will not prejudice the prosecution of the present proceeding for review of said order.

It is therefore ordered that said application for stay be denied on condition that the compliance with said order of the Public Service Commission will not prejudice the prosecution of the present proceeding for review of said order.

ENTER AUG 6, 1987

/s/ HENRY F. TODD
PRESIDING JUDGE
/s/ BEN H. CANTRELL, JUDGE

SUPPLEMENTAL APPENDIX D

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

NO: 3-87-0633

FEDERAL EXPRESS CORPORATION,
Plaintiff,

VS.

TENNESSEE PUBLIC SERVICE
COMMISSION, et al.,
Defendants.

JUDGE WISEMAN

MOTION TO CONSOLIDATE PRELIMINARY INJUNCTION HEARING WITH TRIAL ON THE MERITS

Defendants, Tennessee Public Service Commission, Frank Cochran, Keith Bissell, and Steven Hewlett, hereby move the Court pursuant to Rule 65 (a) (2) to consolidate the trial on the merits in this case with the preliminary injunction hearing scheduled for 9:00 a.m. on August 20, 1987. As grounds for this motion , defendants assert that because no factual dispute exists in this case and the issues are issues of statutory construction which the parties have briefed and argued several times before the Commission, the Court should consolidate the trial on the merits with the preliminary injunction hearing set in this case.

A memorandum in support of this motion is submitted with this motion.

Respectfully submitted,

Donald L. Scholes
Deputy General Counsel
Tennessee Public Service Commission
460 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-3191

Attorney for the Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Motion has been forwarded to Alfred H. Knight and Marian F. Harrison, Willis & Knight, 215 Second Avenue, North, Nashville, Tennessee 37201; Val Sanford, Gullett, Sanford, Robinson, & Martin, on behalf of Purolator Courier Service Corporation, Intervenor, Metropolitan Federal Building, Third Floor, 430 Fourth Avenue, North, Nashville, Tennessee 37219-0757 on this ___ day of August, 1987.

/s/ Donald L. Scholes
Attorney for Defendants

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3-87-0633

FEDERAL EXPRESS CORPORATION,
Plaintiff

VS.

TENNESSEE PUBLIC SERVICE COMMISSION, et al.,
Defendants

JUDGE WISEMAN

MEMORANDUM IN SUPPORT OF MOTION TO CONSOLIDATE PRELIMINARY INJUNCTION HEARING WITH TRIAL ON THE MERITS

Defendants, Tennessee Public Service Commission, Frank Cochran, Keith Bissell, and Steven Hewlett, hereby move the court pursuant to Rule 65 (a)(2) to consolidate the trial on the merits in this case with the preliminary injunction hearing scheduled for 9:00 a.m. on August 20, 1987.

Under Rule 65(a)(2) of the Federal Rules of Civil Procedure, the Court may order the trial of an action on the merits to be consolidated with a preliminary injunction hearing. The Advisory Committee Note on Rule 65 states that:

> The authority [to consolidate] can be exercised with particular profit when it appears that a substantial part of the evidence offered on the application [for preliminary injunction] will be relevant to the merits.

Therefore, the consolidation of a trial on the merits with a preliminary injunction hearing is encouraged with the evidence

to be offered in the preliminary injunction hearing and the trial on the merits are substantially the same.

The consolidation of a trial on the merits with a preliminary injunction hearing minimizes the potential adverse effect of what may prove to be an unjustified restraint on the defendant and shortens the time plaintiff may be threatened by irreparable harm. 11 Wright & Miller, *Federal Practice and Procedure*, § 2950 at 484 (1973). Consolidation may obviate the need to decide whether a preliminary injunction is necessary since a decision on the merits may be reached before irreparable harm is sustained by a plaintiff. *Id.* at 485.

If a motion to consolidate should ever be granted under Rule 65(a)(2) in a case, the present case is that case. The facts in the present case are not in dispute. The only issues before the court are issues of statutory construction. Therefore, the Court will consider the same issues in the preliminary injunction hearing which it would consider in a trial on the merits. By consolidating the Court can avoid having the same arguments presented at both the preliminary injunction hearing and a trial on the merits and can avoid an unnecessary delay in a decision on the merits. When no material issue of fact is in dispute, a court should grant a motion to consolidate a trial on the merits with a preliminary injunction hearing. *Saunders v. Washington Metropolitan Area Trans. Auth.*, 359 F. Supp. 457 (D.D.C. 1973).

By consolidating the Court may well obviate the need for a preliminary injunction in this case. The Commission has extended the time for Federal Express to file its application for a certificate of convenience and necessity to August 25, 1987. If the Court makes a decision on the merits in this case before August 25, 1987, no preliminary injunction will be necessary. If no decision is made by August 25, 1987, the Court can still shorten the time Federal Express may be threatened by alleged irreparable harm and minimize restraint on the Commission's power to regulate

intrastate transportation by motor vehicle by consolidating the trial on the merits in this case with the preliminary injunction hearing.

A consolidation will not prejudice the right of Federal Express to present its case and be heard on the merits. No factual dispute exists. Federal Express' case, like the Commission's, consists of legal arguments on the statutes in question. Federal Express has presented its legal arguments in this case on several occasions. Federal Express presented its legal arguments in a written response to the Commission's show cause order entered July 2, 1986, in the administrative hearing, in post-hearing briefs before the Commission, in oral argument before the Commission, and before Judge Higgins in a hearing on a temporary restraining order. Federal Express should have no problem presenting its case on the merits at the preliminary injunction hearing scheduled for August 20, 1987.

For these reasons, the Court should grant this motion to consolidate the trail on the merits in this case with the preliminary injunction hearing.

Respectfully submitted,

/s/ Donald L. Scholes
Tennessee Public Service Commission
460 James Robertson Parkway
Nashville, Tennessee 37219
615/741-3191

Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Memorandum has been forwarded to Alfred H. Knight and Marian F. Harrison, Willis & Knight, 215 Second Avenue, North, Nashville, Tennessee 37201; Val Sanford, Gullett, Sanford, Robinson, & Martin, on behalf of Purolator Courier Service Corporation, Intervenor, Metropolitan Federal Building, Third Floor, 430 Fourth Avenue, North, Nashville, Tennessee 37219-0757 on this 18th day of August, 1987.

/s/ Donald L. Scholes

SUPPLEMENTAL APPENDIX E

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

NO: 3-87-0633

FEDERAL EXPRESS CORPORATION,
Plaintiff

VS.

TENNESSEE PUBLIC SERVICE
COMMISSION, et al.,
Defendants

JUDGE WISEMAN

ANSWER OF THE TENNESSEE PUBLIC SERVICE COMMISSION ET AL.

Come now the Defendants Tennessee Public Service Commission (hereinafter Commission) *et al.* by an through their attorney and for answer to Plaintiff's complaint would show this Court as follows:

I.

In response to the numbered allegations in the complaint the Defendants respond paragraph by paragraph as follows:

1. Defendants admit the allegations of Paragraph 1.

2. Defendants admit that plaintiff Federal Express Corporation's principal place of business is in Memphis, Tennessee but are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 2.

3. Defendants admit the allegations of Paragraph 3.

4. Defendants admit the allegations of Paragraph 4.

5. Defendants admit the allegations of Paragraph 5.

6. Defendants admit the allegations of Paragraph 6 except to deny that plaintiff is lawfully operating its intrastate ground transportation in Tennessee under the auspices of the Federal Aviation Act of 1958.

7. Defendants admit the allegations of Paragraph 7.

8. Defendants admit the allegations of Paragraph 8.

9. Defendants admit the allegations of Paragraph 9 except to deny that the Tennessee Court of Appeals has not acted upon plaintiff's request for a stay and to deny that plaintiff currently faces a compliance deadline on August 9, 1987. Defendants aver that the Tennessee Court of Appeals denied plaintiff's request for a stay on August 6, 1987 (Exhibit A) and the defendants have entered an order extending the time for plaintiff to file an application for a certificate of convenience and necessity until August 25, 1987 (Exhibit B).

10. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in the first sentence of Paragraph 10. Defendants admit the remaining allegation in Paragraph 10 except to deny that intrastate transportation in Tennessee provided by plaintiff wholly by motor vehicle is exempted from state regulation by the Airline Deregulation Act of 1978.

11. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 11.

12. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 12.

13. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 13.

14. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 14.

15. Defendants admit the allegations of Paragraph 15.

16. Defendants admit that the Commission never acted upon plaintiff's request for a stay of the Commission's Final Order. Defendants deny that the Tennessee Court of Appeals has not acted upon plaintiff's request for a stay of the commission's Final Order. Defendants aver that the Tennessee Court of Appeals denied plaintiff's request for a stay on August 6, 1987 (Exhibit A).

17. Defendants admit that the Commission has the authority to supervise and regulate every motor carrier in Tennessee pursuant to T.C.A. § 65-15-106 and that the Commission designates law enforcement officers to police and enforce the provisions of Chapter 15 of Title 65 of the Tennessee Code Annotated. Defendants deny that its Final Order begins the immediate enforcement of all state regulation. Defendants aver that the Commission's Final Order only requires plaintiff to file an application for a certificate of convenience and necessity or else cease and desist from providing intrastate service in Tennessee wholly by motor vehicle. While plaintiff's application is pending, the Commission will not attempt to interfere with plaintiff's intrastate service in Tennessee provided wholly by motor vehicle.

18. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 18.

19. Defendants deny the allegations of Paragraph 19.

20. Defendants deny that Commission regulation of intrastate transportation provided by plaintiff wholly by motor vehicle is in contravention of the Airline Deregulation Act of 1978 and the United States Constitution. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 20.

21. Defendants deny the allegations of Paragraph 21.

II.

Defendants aver that section 105 of the Airline Deregulation Act of 1978, 49 U.S.C. § 1305, does not preempt the Commission from regulating Tennessee intrastate transportation provided by plaintiff wholly by motor vehicle. Therefore, because plaintiff provides a for-hire transportation service within Tennessee by motor vehicle, plaintiff is subject to the Commission's regulation of motor carriers under Chapter 15 of Title 65 of the Tennessee Code Annotated.

III.

All allegations in the complaint not heretofore specifically admitted or denied are hereby generally denied and denied as though separately and specifically denied.

And now having fully answered, the defendants pray that no preliminary injunction be issued preventing the Commission from enforcing its Final Order of June 9, 1987 and that this case be dismissed with costs adjudged against the plaintiff.

Respectfully submitted,

/s/ Donald L. Scholes
Tennessee Public Service Commission
460 James Robertson Parkway
Nashville, Tennessee 37219
615/741-3191

Attorney for the Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Answer has been forwarded to Alfred H. Knight and Marian F. Harrison, Willis & Knight, 215 Second Avenue, North, Nashville, Tennessee 37201; Val Sanford, Gullett, Sanford, Robinson, & Martin, on behalf of Purolator Courier Service Corporation, Intervenor, Metropolitan Federal Building, Third Floor, 430 Fourth Avenue, North, Nashville, Tennessee 37219-0757 on this ____ day of August, 1987.

/s/ Donald L. Scholes
Attorney for Defendants

IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

No. _____

FEDERAL EXPRESS CORPORATION,
Petitioner,

vs.

TENNESSEE PUBLIC SERVICE
COMMISSION, et al.,
Respondents.

ORDER

The application of Federal Express Corporation for a stay of a final order entered by the Public Service Commission on June 9, 1987, was heard by the undersigned on August 6, 1987.

Upon consideration of said application, memorandum in support thereof, exhibits thereto, responses of the Public service Commission and Purolator Courier Corporation, and argument of counsel, it has been determined that said application should be denied, but on condition that compliance with said order of the Public Service commission will not prejudice the prosecution of the present proceeding for review of said order.

It is therefore ordered that said application for stay be denied on condition that the compliance with said order of the Public Service Commission will not prejudice the prosecution of the present proceeding for review of said order.

ENTER _____

/s/ HENRY F. TODD
PRESIDING JUDGE

/s/ BEN H. CANTRELL, JUDGE

Exhibit A

BEFORE THE TENNESSEE PUBLIC SERVICE COMMISSION

Nashville, Tennessee

August 10, 1987

IN RE: SHOW CAUSE ORDER AGAINST FEDERAL EXPRESS CORPORATION

DOCKET NO. SMC-977

ORDER

In its Final Order in this matter dated June 9, 1987, the Commission concluded that Tennessee intrastate transportation provides wholly by motor vehicle by Federal Express Corporation was subject to Commission regulation. Therefore, the Commission ordered Federal Express to either file an application for a certificate of convenience and necessity within thirty (30) days of the date of the Final Order or else cease and desist from providing intrastate service within Tennessee wholly by motor vehicle. By Order dated July 14, 1987, the Commission extended the time for filing an application to August 9, 1987 (Because August 9, 1987 is a Sunday, Federal Express has until Monday, August 10, 1987, to file an application under the terms of our Order).

On August 4, 1987, Federal Express filed an Application for Immediate Stay with the Tennessee Court of Appeals, Middle Section, requesting that the court stay the requirement that Federal Express file an application pending a determination of the substantial Constitutional and statutory issues raised in the petition for review. On August 6, 1987, the Court of Appeals entered an Order denying the Application for Immediate Stay. On August 7, 1987, Federal Express filed a complaint in the United State District Court for the Middle District of Tennessee against the Commission seeking a declaratory judgment that the

Commission has been preempted from regulating intrastate transportation provided by Federal Express wholly by motor vehicle. At the same time Federal Express filed a Motion for Temporary Restraining Order seeking to restrain the Commission from requiring it to file an application for a certificate of convenience and necessity as required in the Final Order. A hearing on the temporary restraining order was held at 1:30 on Friday, August 7, 1987. At the conclusion of the hearing, the court took the Motion for Temporary Restraining Order under advisement.

Because the Motion for Temporary Restraining Order has not yet been acted upon, the Commission finds that Federal Express should be given an additional fifteen (15) days to complete and file its application. Therefore, the time for Federal Express to file an application for a certificate of convenience and necessity is hereby extended until August 25, 1987.

It is so ordered.

/s/ Frank D. Cochran
CHAIRMAN

/s/ Keith Bissell
COMMISSIONER

/s/ Steven Hewlett
COMMISSIONER

ATTEST
/s/ Illegible
EXECUTIVE DIRECTOR

Exhibit B

SUPPLEMENTAL APPENDIX F

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

NO: 3-87-0633

FEDERAL EXPRESS CORPORATION,
Plaintiff

VS.

TENNESSEE PUBLIC SERVICE
COMMISSION, et al.,
Defendants

JUDGE WISEMAN

TRIAL BRIEF OF DEFENDANTS

Donald L. Scholes
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Tennessee Public Service Commission
460 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-3191

Attorney for Defendants

August 18, 1987

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ISSUES

1. Whether section 105 of the Airline Deregulation Act of 1978, 49 U.S.C. § 1305, preempts the Commission from regulating Tennessee intrastate transportation provided by Federal Express wholly by motor vehicle.

2. Whether Commission regulation of Tennessee intrastate transportation provided by Federal Express wholly by motor vehicle unduly burdens interstate commerce.

STATEMENT OF THE CASE AND FACTS

Federal Express Corporation filed this complaint and requested a preliminary injunction against the defendants (hereinafter referred to collectively as the Commission) because of a Final Order entered by the Commission on June 9, 1987. In this Final Order the Commission concluded the Tennessee intrastate transportation provided by Federal Express wholly by motor vehicle was subject to Commission regulation. Therefore, the Commission ordered Federal Express to either file an application for a certificate of convenience and necessity within thirty days of the date of the Final Order or else cease and desist from providing Tennessee intrastate service wholly by motor vehicle. In an Order entered on July 14, 1987, the Commission extended the time for Federal Express to file its application until August 9, 1987.

The Commission entered this Final Order in a show cause proceeding initiated by the Commission. On July 2, 1986, the Commission entered a show cause order against Federal Express ordering it to appear and show cause why it should not immediately cease and desist from providing intrastate ground transportation service in Tennessee as a common carrier without first obtaining a certificate of convenience and necessity from the Commission pursuant to T.C.A. § 65-15-107.

At the administrative hearing in this case, Federal Express admitted that it provides a for-hire transportation service between points in Tennessee wholly by motor vehicle. Therefore, the Commission concluded that under T.C.A. §65-12-102(c), Federal Express is a motor carrier. Thus, intrastate moves made by Federal Express wholly by motor vehicle are subject to the Commission's jurisdiction. Under T.C.A. § 65-12-107, a motor carrier must obtain a certificate of convenience and necessity from the Commission before providing a for-hire transportation service by motor vehicle within Tennessee. Because the Commission had never issued Federal Express a certificate of convenience and necessity, the Commission ordered Federal Express to either file an application for a certificate or else cease and desist from providing intrastate service in Tennessee wholly by motor vehicle. The Commission stated in its Final Order that it would not interfere with Federal Express' existing intrastate service provided wholly by motor vehicle as long as an application for a certificate was filed within thirty days of the date of the Final Order and expeditiously prosecuted.

Federal Express asserted before the Commission that federal law had preempted the Commission's regulation of its intrastate transportation provided wholly by motor vehicle. Federal Express asserted that section 105 of the Airline Deregulation Act of 1978, 49 U.S.C. § 1305, preempted Commission regulation. This section provides that no state "shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation." 49 U.S.C. § 1305(a)(1). The Commission concluded that Congress only intended for section 105 to preempt the states from regulating air transportation services provided by air carriers. The Commission concluded that section 105 does not preempt the states from regulating other transportation services which an air carrier may seek to provide. Therefore, the

Commission concluded that intrastate transportation provided by Federal Express wholly by motor vehicle was subject to Commission regulation.

On July 9, 1987, Federal Express filed a petition for review with the Tennessee Court of Appeals, Middle Section, seeking judicial review of the Commission's Final Order. On August 4, 1987, Federal Express filed an Application for Immediate Stay with the Tennessee Court of Appeals asking the court to stay the Commission's Final Order until a final determination on the petition for review. The Tennessee Court of Appeals conducted a hearing on the Application for Immediate Stay and denied the application on August 6, 1987. The next day Federal Express filed this complaint against the Commission seeking a declaratory judgment that the Commission has been preempted from regulating Tennessee intrastate transportation provided by Federal Express wholly by motor vehicle. Federal Express also filed a Motion for a Temporary Restraining Order seeking to restrain the Commission from requiring Federal Express to file an application for a certificate of convenience and necessity by August 9, 1987, as required by the Final Order. A hearing on the temporary restraining order was held at 1:30 p.m. on August 7, 1987, before the Honorable Thomas A. Higgins. At the conclusion of the hearing, the court took the Motion for Temporary Restraining Order under advisement. Before Judge Higgins acted upon the Motion for Temporary Restraining Order, the Commission entered an Order on August 10, 1987, giving Federal Express an additional fifteen days to complete and file its application for a certificate. On August 10, 1987, Judge Higgins entered an Order granting Federal Express a temporary restraining order and setting a time and date for a preliminary injunction hearing.

ARGUMENT

Under the Tennessee Motor Carrier Act (hereinafter the Act), the Commission has the statutory duty to supervise and regulate the transportation of persons and property by motor vehicle over the highways of Tennessee to promote and conserve the interest and convenience of the public. T.C.A. § 65-15-101. Under T.C.A. § 65-15-102 (c), a motor carrier is defined to include any person or entity "operating any motor vehicle with or without semitrailers attached, upon any public highway for the transportation of persons or property or both or for providing or furnishing such transportation service, for hire as a common carrier."

In the administrative hearing before the Commission, Federal Express admitted that it provides for-hire Tennessee intrastate transportation wholly by motor vehicle over the highways of Tennessee as a common carrier. Appendix, Volume 1, at 22-23 (a certified copy of the transcript of the administrative hearing before the Commission is attached as an appendix to this brief). Therefore, Federal Express is a motor carrier under the Act and is subject to Commission regulation under the Act. The Act further provides that a motor carrier cannot lawfully operate as a common carrier between points in Tennessee without first obtaining a certificate of convenience of necessity. T.C.A. § 65-15-107. The Commission has never issued Federal Express a certificate of convenience and necessity.

Federal Express asserts that its Tennessee intrastate transportation provided wholly by motor vehicle is not subject to Commission regulation because: (1) the Airline Deregulation Act of 1978 preempts Commission regulation; and (2) Commission regulation unduly burdens interstate commerce. The facts in this case are not in dispute. The issues before the court are issues of statutory construction.

1. *In enacting the Airline Deregulation Act of 1978, Congress did not intend to preempt the Commission's regulation of intrastate transportation provided by Federal Express wholly by Motor vehicle.*

Section 105 (a) of the Airline Deregulation Act of 1978, 49 U.S.C. § 1305 (a) preempts state economic regulation of air carriers.

This section provides:

> (a) Preemption
>
> (1) Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.
>
> (2) Except with respect to air transportation (other than charter air transportation) provided pursuant to a certificate issued by the Board under section 1371 of this title, the provisions of paragraph (1) of this subsection, shall not apply to any transportation by air of persons, property, or mail conducted wholly within the State of Alaska.

Federal Express argues that Congress intended for section 105 to preempt the states from regulating all types of transportation services provided by an air carrier, including transportation provided wholly by motor vehicle. The Commission asserts that Congress expressed no such intent. The plain language of section 105, the legislative history of the Airline Deregulation Act of 1978, the historic division of regulatory responsibility for ground and air transportation, and the efforts of Federal Express to have section 105 amended support the Commission's position.

A. *The plain language of section 105 shows that congress only intended to preempt the air transportation rates, routes, and services of air carriers.*

To understand the scope of federal preemption under section 105, this section must be read in the context of the statute as a whole. *United States v. Morton,* 467 U.S. 822, 828, 104 S.Ct. 2769, 2773, 81 L.Ed. 2d 680, 688 (1984). In interpreting a statute one should not look to a particular word or phrase in isolation, but should consider it in connection with the whole statute and related statutes, and the objects and policy of the law, in order to give it such a construction as will carry into effect the will or intent of Congress. *Kokoszka v. Belford,* 417 U.S. 642, 650, 94 S. Ct. 2431, 2436, 41 L.Ed. 2d 374, 381 (1974).

Therefore, the proper construction of section 105 requires consideration of the whole statute of which it is a part. Section 105 is a part of Subchapter 1 of Chapter 20 of Title 49 of the United States Code. Chapter 20 is entitled "Federal Aviation Program." Nowhere in that chapter is any intent expressed to deal in any way with the regulation of ground transportation.

More importantly, the terms "air carrier" and "air transportation" used in section 105 limit the scope of the preemption. Congress defines an air carrier as "any citizen of the United States who undertakes . . . to engage in air transportation." 49 U.S.C. § 1301(3). Air transportation means "interstate, overseas, or foreign air transportation or the transportation of mail by aircraft." *Id.* at § 1310(10). *Therefore, section 105 preempts state regulation of the rates, routes, and services of Federal Express as an air carrier, which by definition encompasses only air transportation.* Section 105 says nothing about the rates, routes, or services of Federal Express as a motor carrier, rail carrier, or any other type of transportation carrier.

Section 105 is not a blanket preemption of all state laws for the benefit of air carriers so as to enable them to operate as they

please in whatever areas they please free from state regulation. Federal Express' interpretation of section 105 extended to its logical conclusion produces results which Congress did not intend. Under Federal Express' interpretation, a motor carrier could circumvent all intrastate regulation of its motor carrier activities in every state by simply obtaining authority to operate as an air carrier between two specific points. Once the motor carrier obtained the status of an air carrier, the motor carrier would simply argue that all intrastate regulation of its motor carrier activities have been preempted by section 105. A motor carrier would be able to avoid all intrastate regulation in every state by becoming an "air carrier." Clearly, Congress did not intend that section 105 produce this result. In fact, Congress specifically reserved to the states the power to regulate intrastate transportation provided by a motor carrier. 49 U.S.C. §105211(b)(1).

No case law supports Federal Express' interpretation of section 105. On the contrary the language of the cases supports the position that only the regulation of air transportation rates, routes, or services preempted. In *Hingson v. Pacific S.W. Airlines,* 743 F. 2d 1408 (9th Cir. 1984), a claim against an air carrier under a California statute prohibiting discrimination against the handicapped by common carriers was preempted as relating to services of an air carrier, but a claim for intentional infliction of emotional distress was not preempted. In *Hiawatha Aviation of Rochester, Inc. v. Minn. Dept. of Health,* 389 N.W. 2d 507 (Minn. 1986), the Minnesota Supreme Court held that section 105 preempted state regulation of entry into the field of air ambulance service, but did not preempt state regulation of the delivery of medical servcies such as staffing requirements and standards for maintenance of sanitary conditions by such an air ambulance.

Federal Express argued before the Commission that the holding of the United States Supreme Court in *Interstate Commerce Commission v. Texas,* ___U.S. ___, 107 S.Ct. 787, 93 L.Ed. 2d

809 (1987), supported its position on the preemption issue. In that case the Texas Railroad Commission attempted to assert jurisdiction over the motor carrier segment of intrastate trailer-on-flatcar and container-on-flatcar intermodal service, commonly known as piggyback service. In piggyback service a rail carrier moves traffic partly by rail and partly by motor vehicle. The Court held that the Texas Railroad Commission did not have jurisdiction over the motor carrier segment of intrastate piggyback service because the motor carrier segment of the move was performed by a rail carrier not subject to the jurisdiction of the Texas Railroad Commission. *In the present case the Commission is not asserting jurisdiction over the motor carrier segment of movements by Federal Express which have a prior or subsequent movement b y air. The Commission is asserting jurisdiction over the intrastate transportation provided by Federal Express wholly by motor vehicle.* Therefore, the *Texas* case is clearly distinguishable from the present case.

B. *The Legislative History of Section 105 Supports the Position that Only Air Transportation is Within the Scope of the Preemption*

Nothing in the legislative history of the Airline Deregulation Act of 1978 (hereinafter Airline Deregulation Act) suggests that Congress intended for section 105 to preempt state regulatory commissions from regulating the intrastate motor carrier operations of an air carrier. No mention of motor carriers or of the preemption of transportation by motor vehicles appears in the legislative history. The legislative history deals only with various aspects of air transportation.

The House Report on the Airline Deregulation Act indicates that its purpose was "to amend the Federal Aviation Act of 1958 to improve air service and provide flexibility in air fares." H.R. Rep. No. 95-1211, 95th Cong. 2d Sess. 1, *reprinted in* [1978] *U.S. Code Cong. & Ad. News* 3737. One of the ways Congress

sought to achieve this goal was to remove the external constraints of both state and federal government route and rate regulation over air transportation to allow market forces to determine the variety, quality, and price of an integrated air transportation system.

Prior to the enactment of the Airline Deregulation Act, carriers providing interstate air transportation services to the public were subject to comprehensive economic regulation by the Civil Aeronautics Board (CAB). No one could provide interstate air transportation services without first obtaining a certificate of public convenience and necessity from the CAB. The rates and services provided by certificated air carriers were subject to regulation by the CAB. [1/] Prior to 1978 many state regulatory commissions had established economic regulatory schemes for intrastate airlines similar to the federal economic regulatory scheme for interstate airlines. In addition, these state regulatory commissions regulated the intrastate activities of CAB-certificated or exempt airlines. *See Hughes Air Corp. v. Public Utilities Commission,* 644 F.2d 1334, 1336 (9th Cir. 1981). The Tennessee Bureau of Aeronautics, which is a part of the Tennessee Department of Transportation, is the state agency in Tennessee which regulates intrastate airlines. T.C.A. § 42-2-101 *et seq.*

In enacting the Airline Deregulation Act, Congress only sought to remove regulatory constraints placed upon air transportation carriers by the CAB and by state regulatory commissions which regulated the intrastate activities of CAB-certificated and exempt carriers. The House Public Works and Transportation Committee's discussion of Section 105 clearly shows that preemption was aimed at state regulation of air transportation:

[1/] Under 49 U.S.C. § 1386(b)(1), the CAB had authority to exempt an air carrier or a class of air carriers from economic regulation when the CAB found that such regulation was not in the public interest.

> Existing law contains no specific provision on the jurisdiction of the States and the Federal Government over airlines which provide both intrastate and interstate service. The lack of specific provisions has created uncertainties and conflicts, including situations in which carriers have been required to charge different fares for passengers traveling between two cities, depending on whether these passengers were interstate passengers whose fare are regulated by the CAB, or intrastate passengers, whose fare is regulated by a State.
>
> H.R. 12611 will prevent conflicts and inconsistent regulations by providing that when a carrier operates under authority granted pursuant to title IV of the Federal Aviation Act, no State may regulate that carrier's routes, rates or services. The bill further provides that if a carrier was primarily an intrastate carrier on August 1, 1977, and subsequently receives authority from CAB, its State authority must be included in its CAB certificate until the CAB modifies the certificate.
>
> The bill also eliminates Federal jurisdiction over certain service which is essentially intrastate in nature. Under existing law, CAB has jurisdiction over air service between two cities in a State if the aircraft passes over places outside the State. H.R. 12611 provides that service between two cities in a State is not subject to CAB jurisdiction solely because the aircraft passes over places outside of the State. This provision does not apply to flights between the Hawaiian Islands which will continue to be regulated by the CAB.

H.R. Rep. No. 95-1211, 95th Cong. 2d Sess. 15-16, *reprinted in* [1978] *U.S. Code Cong. & Ad. News* 3737, 3751-52.

In enacting section 105 Congress did not attempt to remove regulatory constraints placed upon air carriers by other federal or state agencies which regulated other modes of transportation

provided by air carriers. Before 1980 the motor carrier segment of some interstate movements by air carriers which required movement both by aircraft and by motor vehicle from origin to destination was still subject to regulation by the Interstate Commerce Commission (ICC). [2/] The Airline Deregulation Act did not exempt the motor carrier segment of such moves by Federal Express or any other air carrier from ICC regulation. The motor carrier segment of such an interstate move did not become exempt from ICC regulation until Congress enacted the Motor Carrier Act of 1980. *See* 49 U.S.C. § 10526(a)(8)(B). Moreover, Federal Express currently holds a certificate of convenience and necessity from the ICC. If Congress intended for the Airline Deregulation Act to truly integrate the air and ground services of an air carrier, why does Federal Express need an ICC certificate to engage in the interstate surface transportation of goods? The answer is clear. The Airline Deregulation Act sought to reduce regulatory restraints on air transportation provided by an air carrier and not other regulations governing other types of transportation services.

Likewise, section 105 of the Airline Deregulation Act only preempts state regulatory commissions from regulating the intrastate air rates, routes, and services of air carriers with authority from the CAB. This section does not preempt state regulatory commissions from regulating other modes of transportation in which an air carrier might engage. Therefore, the Tennessee Bureau of Aeronautics has been preempted from regulating the air transportation rates, routes, and services of air

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[2/] Before 1980 the incidental-to-air transportation exemption from ICC regulation was limited to bona fide collection, delivery, or transfer service. In addition, ICC regulations limited the exemption to geographical areas surrounding airports and cities adjacent to those airports. H.R. Rep. No. 96-1069, 96th Cong. 2d Sess. 19, *reprinted in* [1980] *U.S. Code Cong. & Ad. News* 2283, 2301.

carriers. The Commission, however, has not been preempted from regulating intrastate transportation provided by air carriers wholly by motor vehicle.

C. *The Historic Structure of The Division of Regulatory Responsibility For Ground and Air Transportation Supports a Finding that Congress did not Intend to Affect Ground Transportation in Enacting Section 105.*

Historically, air transportation and ground transportation have been regulated by different federal agencies under different statutes. The Civil Aeronautics Board (CAB) regulated the air transportation industry. The Interstate Commerce Commission (ICC) regulates the ground transportation industry. In addition, the regulatory responsibility of air and ground transportation has been divided between federal and state governments.

The Motor Carrier Act of 1980 (hereinafter Motor Carrier Act) specifically and expressly allocates regulatory responsibility for ground transportation by motor vehicle. In the Motor Carrier Act, Congress reserved to the states the power to regulate intrastate transportation provided by a motor carrier with exceptions not material here. 49 U.S.C. § 10521(b)(1). No provision of the Motor Carrier Act purports to preempt the jurisdiction of states to regulate shipments moving wholly by motor vehicle in intrastate commerce. If Congress intended to preempt state regulation of motor carrier operations by air carriers, the Motor Carrier Act would have been the logical place to express that intention.

In the Motor Carrier Act, Congress exempted from ICC jurisdiction the transportation of property in interstate commerce performed as part of a continuous movement which, prior or subsequent to such part of the continuous movement, has been or will be transported by an air carrier. 49 U.S.C. §10526(a)(8)(B). In the absence of this exemption language, the interstate ground

transportation of air freight would still be subject to ICC regulation. H.R. Rep. No. 96-1069, 96th Cong. 2d Sess. 19 (1980), *reprinted in* [1980] *U.S. Code Cong. & Ad. News* 2283, 2301. In the legislative history of the Motor Carrier Act, Congress stated that it was adopting the exemption from ICC jurisdiction concerning continuous ex-air movements "to bring it into line with what the Congress has done on air cargo movements. Since the transportation of air cargo is now exempt from Federal economic regulation, the Committee believes that it makes sense to exempt the entire movement, including the motor carrier transportation portion." *Id.* Therefore, if Congress had intended to exempt intrastate ground movements by air carriers from regulation, it would have said so. The fact that it did not say so confirms no such intention existed.

Federal preemption of state regulatory power in the field of commerce is not favored in the absence of "persuasive reasons" - either that Congress has unmistakably so ordained or the nature of the subject matter permits no other conclusion. *Chicago & N.W. Transp. v. Kalo Brick & Tile*, 450 U.S. 311, 317, 101 S. Ct. 1124, 1130, 67 L.Ed. 2d 258 (1981).

Congress has expressly spoken on the subject of state regulation of intrastate motor carrier operations. In the Interstate Commerce Act, Congress expressly preserves the dual system of motor carrier regulation, reserving to the states the power to regulate intrastate transportation provided by a motor carrier except as otherwise specifically provided therein. 49 U.S.C. § 10521. Under the Interstate Commerce Act, a motor carrier is defined as a "person holding itself out to the general public to provide motor vehicle transportation for compensation over regular or irregular routes, or both." 49 U.S.C. § 10102(14). In holding itself out to the general public to provide motor vehicle transportation for compensation, Federal Express is clearly a motor common carrier. Nothing in the Interstate Commerce Act preempts state regulation of the intrastate activities of Federal Express when it

operates as a motor common carrier. Therefore, Congress, far from expressing a clear and manifest intent to preempt state regulation of Federal Express when it chooses to operate as a motor common carrier wholly in intrastate commerce, has on the contrary evidenced a clear and manifest intent that state regulation should continue.

D. *The efforts of Federal Express to have section 105 amended to accomplish what it here argues has already been accomplished undercut its contentions as to preemption.*

Mr. Armando Labrada, Vice President and Associate General Counsel for Purolator, testified that Federal Express has initiated a proposal to Congress to preempt state regulation of intrastate surface movements by air carriers by amending section 105. Appendix, Volume 2, at 40.

If Federal Express believes that section 105 preempts state regulation of intrastate ground transportation by air carriers, then why is Federal Express seeking to amend section 105 to achieve this same goal? The answer is clear. Section 105 as it currently exists does not preempt such state regulation.

2. *Commission regulation of Tennessee intrastate transportation provided by Federal Express wholly by motor vehicle doe not unduly burden interstate commerce under the Commerce Clause.*

In arguing that Commission regulation unduly burdens interstate commerce, Federal Express simply ignores the fact that it is operating as a motor common carrier wholly in Tennessee intrastate commerce in the subject operations and ignores the law that Congress has left the regulation of such motor common carrier operations to the states. Where Congress has spoken, as it has here, commerce clause arguments have no relevance. *Prudential Insurance Co. v. Benjamin,* 328 u.S. 408, 66 S.Ct. 1142, 90 L.Ed. 1342 (1946).

Nothing in the language of or legislative history of the Airline Deregulation Act or any other act of Congress indicates that Congress intended to change the policies governing the regulation of motor common carriers as expressed in the Interstate Commerce Act. The Airline Deregulation Act is concerned with air transportation and air carriers not motor carrier transportation and motor common carriers. In the Airline Deregulation Act, Congress did clearly preempt state regulation of the rates, routes, and services of air carriers, but Congress in no way expressed any intent to preempt state regulation of rates, routes, and services of motor common carriers. Therefore, so long as Federal Express chooses to provide air transportation as an air carrier, state regulation of its rates, routes, and services is clearly preempted. In this case, however, Federal Express has chosen to enter an entirely separate field and to conduct operations as a motor common carrier. In so doing Federal Express, by its own acts, leaves behind its status as an air carrier and instead becomes a motor common carrier as that term is defined in both the Interstate Commerce Act and the Tennessee Motor Carrier Act. As a motor common carrier, Federal Express is subject to the same regulatory standards as any other motor common carrier. Nowhere has Congress indicated any intent to allow air carriers to become motor common carriers without being subject to the same regulations as other motor common carriers. Policy statements in the Airline Deregulation Act concerning air transportation under the regulatory system adopted by Congress for air transportation do not control the regulation of ground transportation by motor vehicle which is controlled by a separate and district federal stature, the Interstate Commerce Act.

Because Congress has left the regulation of intrastate motor common carrier operations to the states, Commission regulation of intrastate transportation provided by Federal Express wholly by motor vehicle does not unduly burden interstate commerce.

CONCLUSION

Based on the foregoing arguments, defendants urge the court to find that Tennessee intrastate transportation provided by Federal Express wholly by motor vehicle is subject to Commission regulation and to dismiss this case.

Respectfully submitted,

/s/ Donald L. Scholes
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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Brief and Appendix has been forwarded to Alfred H. Knight and Marian F. Harrison, Willis & Knight, 215 Second Avenue, North, Nashville, Tennessee 37201; Val Sanford, Gullett, Sanford, Robinson, & Martin, on behalf of Purolator Courier Service Corporation, Intervenor, Metropolitan Federal Building, Third Floor, 430 Fourth Avenue, North, Nashville, Tennessee 37219-0757 on this ___ day of August, 1987.

/s/ Donald L. Scholes
Attorney for Defendants

SUPPLEMENTAL APPENDIX G

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

NO. 3-87-0633

FEDERAL EXPRESS CORPORATION,
Plaintiff,

vs.

TENNESSEE PUBLIC SERVICE
COMMISSION, *et al.*
Defendants.

Judge Wiseman

SUPPLEMENT TO TRIAL BRIEF OF DEFENDANTS

At the status conference on August 20, 1987, the Court set this matter for trial on the merits on September 10, 1987, and with the consent of the parties extended the temporary restraining order granted by Judge Higgins to that date. At the status conference the court *sua sponte* raised the issue of abstention.[1] Referring to the *Pullman* decision,[2] the Court suggested that this matter might be a proper case for exercise of its discretionary power of abstention and noted that continuation of this appeal could result in conflicting federal and state rulings. In response to the Court's statements, this supplemental brief discusses the application of the abstention doctrine to this case and concludes that abstention is appropriate in the circumstances here.

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[1] See *Louisiana Power & Light v. City of Thibodaux*, 360 U.S. 25 (1959).

[2] *Railroad Commission of Texas v. Pullman*, 312 U.S. 496 (1941).

ARGUMENT

Federal Express comes to this Court while its appeal of the Commission's decision lies pending in the state Court of Appeals. The Company unsuccessfully sought a stay of the agency's decision both from the Commission and the Court of Appeals. It now bites the apple a third time.

When a party seeks either declaratory or injunctive relief against a state administrative agency in federal court, a federal court should abstain from exercising its powers to restrain the enforcement of an administrative order when the state has a unified system for review of its administrative orders and when federal intervention would have a disruptive effect on the state's efforts to establish a coherent policy on a matter of substantial public concern. 17 Wright & Miller, *Federal Practice and Procedure* § 4244 at 485 (1978). That is precisely the situation presented by this case.

The United States Supreme Court applied the abstension doctrine in a case similar to the present case in *Alabama Public Service Commission v. Southern Railway Co.,* 341 U.S. 341, 71 S.Ct. 762, 95 L.Ed. 1002 (1950). In that case the railroad filed an application with the Alabama Public Service Commission for permission to discontinue intrastate rail passsenger service between two points in Alabama. Under Alabama law the railroad could not discontinue intrastate rail passenger service until the Commission determined that the public interest no longer required the service proposed to be discontinued. The Commission conducted a hearing on the proposed discontinuance and refused to permit the discontinuance. Instead of appealing to the state courts, the railroad filed a complaint and sought injunctive relief in federal district court against the Commission. The railroad alleged that continued operation of the service proposed to be discontinued amounted to a confiscation of its property in violation of the due process clause of the Fourteenth Amendment.

The federal district court enjoined the Commission from enforcing its order denying the discontinuance. The United States Supreme Court reversed the district court on the ground that the district court should have abstained from enjoining the Commission.

In reversing the district court the Court stated that "[f]ew public interest have a higher claim upon the discretion of federal chancellor than the avoidance of needless friction with state policies." *Id.* at 350, 71 S.Ct. at 768, 95 L.Ed. at 1009 (citations omitted). The Court found that abstention was appropriate for two primary reasons. First, the determination of whether the public interest required the continuation of the service proposed to be discontinued involved a state regulatory scheme which required the consideration of local factors. *Id.* at 348, 71 S.Ct. at 767, 95 L.Ed. at 1008. Second, because Alabama state law provided for a review by a specific court of Commission decisions, the Court concluded that the appeal of a Commission order was an integral part of the regulatory process under state law. Therefore, the Court held that federal court intervention was not necessary.

The Sixth Circuit has upheld an abstention on similar facts to the present case in *Ada-Cascade Watch Co., Inc. v. Cascade Resource Recovery, Inc.*, 720 F.2d 897 (6th Circuit 1983). Plaintiffs there sought to have a United States District Court overturn a grant of a solid-waste disposal permit to the defendants. Defendants had followed state regulatory requirements and qualified for the permit. Plaintiffs contended, in federal court, that the state agency had erred and that a federal statute had been violated by the construction of the facility. Defendants moved for summary judgment, prevailed, and the Court of Appeals affirmed. *Id.* at 898.

The Sixth Circuit based its affirmance on *Burford v. Sun Oil Company*, 319 U.S. 315, 63 S.Ct. 1089, 87 L.Ed. 1424 (1942). As in *Alabama Public Service Commission*, the two factors

justifying abstention in *Burford* were: (1) the presence of a complex state regulatory scheme which would be disrupted by federal court review; and (2) the existence of a state-created forum with specialized competence in the particular area. *Id.* at 332-34, 63 S.Ct. at 1106-07, 87 L.Ed. at 1434-35.

The facts warranting abstention in *Alabama Public Service Commission* and *Burford* are also present in this case. The Tennessee Commission has the statutory duty to supervise and regulate the transportation of persons and property by motor vehicle over the highways of Tennessee to promote and conserve the interest and convenience of the public. T.C.A. § 65-15-101. Its statutory duty includes the certification of motor carriers providing for-hire transportation within Tennessee. The Commission's ability to regulate transportation in Tennessee with consistency would be seriously impaired if this Court were to intervene in this type of case, thereby creating overlapping and, quite possibly, inconsistent, avenues of appeal. If motor carriers can forestall Commission regulation by simply obtaining an injunction in federal district court against Commission orders by asserting a federal right, the carefully regulated state transportation system in Tennessee would be disrupted. Constant friction between the federal courts and state policies established by the Commission would result.

Tennessee law provides for a unified scheme of judicial review of Commission orders. Unlike the review of orders of most state agencies, final decisions of the Commission are appealed directly to the Tennessee Court of Appeals, Middle Section, pursuant to T.C.A. § 4-5-322 (b) (1). Parties may also appeal, by permission, to the Tennessee Supreme Court. Review by the state courts insures the uniform application of specialized competence. There is a strong state interest in "centralizing judicial review," thereby avoiding forum shopping and other practices that are wasteful of judicial resources. 720 F.2d at 905. In short, the facts of this case present a classic situation appro-

priate for abstention on the grounds enunciated in *Burford* and in *Ada-Cascade Watch Co.* Federal is simply asking this Court to "second-guess a state agency" in the exercise of its assigned duties. See 720 F.2d at 905.

Finally, the case for abstention here is even stronger that in *Ada- Cascade Watch Co.*. In that case, the state proceedings had ended. Here, the state proceedings are in full swing. The Court has even less justification for interference at this time.

This is a state administrative issue which should be solved, in the first instance, by those most familiar with the governing state law. Especially when a state has provided an adequate forum for the protection of the rights of the complaining party (as the Tennessee legislature has done here by providing a right of judicial review by the Tennessee Court of Appeals), a federal court should decline to exercise its jurisdiction. *See Muskegon Theatres v. City of Muskegon,* 507 F.2d 199, 205 (6th Cir. 1974).

CONCLUSION

This court may avoid an unnecessary trial and ruling which may conflict with a state court decision by invoking the doctrine of abstention. Judgement in favor of the defendant will quickly and expeditiously achieve this end. Federal Express will not be harmed by an order granting judgement on the basis of abstention, since it has a pending appeal in the Tennessee Court of Appeals, where its rights can be fully adjudicated. The Court should decline to interfere with the proper state resolution of this appeal issue.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX H

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

CIVIL CASE NO. 03:87-0633

FEDERAL EXPRESS CORPORATION,
Plaintiff,

v.

TENNESSEE PUBLIC SERVICE COMMISSION, et al.,
Defendants.

September 10, 1987, et seq.
Nashville, Tennessee

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE
THOMAS A. WISEMAN, JR.

APPEARANCES:

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MS. HARRISON: For the record, Your Honor, Mr. Cloud is referring to an exhibit that's been marked —pre-marked No. 4, which is a map of the United States.

BY MS. HARRISON:

Q Mr. Cloud, using this exhibit No. 4, can you use this to help you illustrate the line haul operation of Federal Express?

A Again, the system devised by Mr. Smith and Federal Express is one conceived to allow in the movement of express shipments a very efficient operation. That efficiency comes again from the consolidation of shipments from any major point through the Memphis hub, serving all points in the United States.

It's also extremely efficient by restricting the sort traditionally, restricting the sort to one location so that mistakes are not made. When you give us your package, you can expect that package to be delivered.

In order to handle the shipments which now move literally between every address in the United States, we have put together the system which is depicted on the chart where some 56 — it's now some 75 flights of large aircrafts move to and from the Memphis Airport each evening.

There are also some flights during the day, the following day, which transport what we call the PZ traffic, which is a second-day product.

But this map does illustrate the daily movement of packages generated throughout the United States through the Memphis hub.

I might also add that there are many occasions where packages moving between points very closely located, between two points very closely located, would actually move to the Memphis hub and back for delivery.

But everything — historically, everything moves through the Memphis hub. We now have minor hubs located in Newark, New Jersey; Oakland, California; have recently purchased the hub which had previously been used by the air operators who were performing service for Purolator Corporation in Indianapolis. And we have now a system that includes a number — three or four hubs, depending upon what year we're looking at. But we are no longer a single-hub operation as we were traditionally.

Q As I understand it, 90 percent of your traffic moves to Memphis and back out; is that right?

A That's correct. Today, approximately 90 percent of all the shipments handled by Federal Express throughout the United States, and as a matter of fact, throughout the world, do in fact move through the Memphis hub.

Q And in the evening. Late in the evening, 11:00 or 12:00, all the planes in the outlying areas converge on Memphis?

A The Federal Express system, as designed, it really — can be, I think, seen rather clearly as a collapsing system.

The aircraft in the perimeters of the United State depart early: and the system begins to be smaller and smaller, as all of the aircraft head toward Memphis, again, very precisely scheduled so that the hub can accommodate traffic as it arrives in Memphis, Tennessee.

Interestingly, I think, we also operate what we call flying spare aircraft that originates at the extremities of the U.S., excess capacity is built into those aircraft and they literally fly over the system as the system collapses so that in case we have a problem with an aircraft, let's say for instance in Kansas City, Missouri, these four spares are designed to be able to simply drop into Kansas City, pick up the traffic that would otherwise have been left in Kansas City due to an aircraft problem, and move the traffic to Memphis.

It's literally a system that collapses in Memphis and becomes a very small system about 2:00 in the morning when 90 percent of the packages are in the hub and expands outward again during the early morning hours, transporting those packages outbound to 99 percent of the population of the U.S.

Q Those flying spares can also and have also flown into Nashville, weather conditions calling upon them to do so and then flying in parts from Nashville to Memphis.

A As a matter of fact, in areas where trucking takes place, particularly in very adverse weather conditions such as ice, we find that aircraft are much more reliable means of transportation than truck.

So there are occasions, have been occasions where 727 aircraft are flown into Nashville to actually take the traffic from Nashville to Memphis that would have otherwise been moved in Memphis by truck.

That occurs throughout the system. This system changes dramatically from night to night. As aircraft problems arise during the evening, we have a system that allows our controller, operational — the individuals involved in operations to divert any aircraft in the United States that has excess capacity in order to relieve a particular problem which might have arisen during the evening with an aircraft or an overabundance of packages in a given location.

Q The flexibility of routing is very important in your system?

A Absolutely. We would not be able to operate this system without total flexibility in aircraft routes.

Q Let me pass you what has been pre-marked —

MS. HARRISON: Your Honor, I move Introduction of Exhibit No. 4.

THE COURT: Received.

BY MS. HARRISON:

Q I pass you what has been pre-marked as Exhibits 5 and 6. Can you identify those for us?

A Yes. These exhibits depict in general terms the flight schedule of Federal Express and you can see that this schedule is actually September 1986. These were the exhibits which we used to

depict the flight schedule in our application to operate the DC10 service to Japan.

But it does, while not totally accurate today in terms of the precise routing of the traffic, gives you a picture of the inbound shipments to Memphis on Exhibit 5, and outbound — inbound movement of aircraft on Exhibit 6.

Q Today, you have more flights than are shown on Exhibits 5 and 6?

A That is correct.

Q Some 75 average a day.

A That's correct.

MS. HARRISON: Your Honor, I move introduction of Exhibits 5 and 6.

THE COURT: Received.

BY MS. HARRISON:

Q I pass you what has been pre-marked Exhibit 7. You have described the DC10 aircraft that you utilize in your truck operation and pass you exhibit pre-marked as Exhibit 7, DC10-30 aircraft. Is that a diagram of the type DC10 aircraft you use?

A This is a diagram showing the container availability on the DC10. This is a DC10-30 aircraft, dash 30F aircraft, which is the largest aircraft that Federal Express operates. You will note it has a maximum cargo capacity of approximately 175,000 pounds, and it would — as you can see, the upper deck has 51 containers of this particular size, and the lower deck, 26 LD3 containers?

Q These containers that are shown here on this DC10-30 aircrafts, are they air cargo containers?

A Yes. They are air cargo containers which are the typical air cargo container utilized with this particular type of aircraft. There would be other types of containers but these are known as the standard air cargo containers.

Q And you utilize air cargo containers on your 727s?

A That is correct.

Q And you also utilized the same air cargo containers on the trucks that you utilized in your system?

A That is correct. We also designed — Federal Express has designed cargo containers that can be split, in effect, split into pieces to accommodate lesser amounts of traffic that can then be reassembled at the container configuration for movement in the aircraft.

But all of the traffic moved by Federal Express in the truck system, either in a truck or in an aircraft, moves from the station to designation in air cargo containers. And this system is an aviation and air cargo system. We certainly utilize motor vehicles for access to the airport facilities and virtually all of these cargo containers, whether they're moving in a truck or moving in aircraft, are moved to or from an airport.

MS. HARRISON: Your Honor, I move for the introduction of Exhibit No. 7.

THE COURT:Received.

BY MS. HARRISON:

Q Now, I'm passing you two photographs pre-marked as Exhibits 8 & 9.

MS. HARRISON: And Your Honor, these are the only copies we have.

THE COURT: All right.

BY MS. HARRISON:

Q Are those pictures of the flight simulator, one of the flight simulators used by Federal Express to train its pilots and employees?

A Yes. Exhibit 8 shows the exterior of the simulator. Exhibit 9 reflects — pardon me, the interior of the simulator. We have the capability and do, in fact, train Federal Express pilots, as well as pilots of other air carriers in both the 727, as well as the DC10. We have a total of three simulators, two 727 simulators, and one DC10 simulator and the training facility which is a building utilized for the sole purpose of training and upgrading our own pilots, as well as occasionally pilots of other air carriers.

MS. HARRISON: I move introduction of Exhibits 8 and 9.

THE COURT: Received.

BY MS. HARRISON:

Q Mr. Cloud, I have put on the easel an exhibit pre-marked Exhibit 10, another map of the United States showing — labeled Feeder Route Map. Could you explain what is depicted on this map?

A Yes. In order to serve the smaller communities, less populated areas of the United States, and give to our customers in those locations the same quality of service that we give our customers in the major cities, we are required to utilize, as is shown, I think, in Exhibit 3, some 130 supplemental aircraft operations. These feeder routes or supplementals are utilized to bring traffic to the truck aircraft when moving the traffic into the Memphis hub or to distribute traffic from the truck aircraft into the smaller communities during the early day in order to accomplish 10:30 or noon delivery or our delivery commitment in areas which include 99 percent of the U.S. population.

This particular chart reflects all of those feeder routes. Some 70 of those aircraft are Cessna 208s. The remainder of those aircraft are various types of aircraft chartered from other companies operating these feeder routes.

MS. HARRISON: Your Honor, I move for introduction of Exhibit 10.

THE COURT: Received.

BY MS. HARRISON:

Q I pass you what has been pre-marked Exhibit 11, Mr. Cloud, labeled Federal Express Operations. Is this an outline of your operation prepared under your supervision for this hearing?

A Yes, it was.

MS. HARRISON: Your Honor, I move for introduction or admission of Exhibit 11 before we begin to go through it.

THE COURT: Received.

BY MS. HARRISON:

Q You list there you have 800 pilots, 272 aircraft mechanics, and so on. I think it's pretty self-explanatory. Seventy-five aircraft de-icers.

A That's correct. I would add that the 800 pilots which are shown on Exhibit 11 actually 800 pilots who are currently on the seniority list. We are training and in the process of hiring pilots that would result in a pilot group numbering at least 1,000.

Q You have your own field maintenance folks listed there, 127 aircraft mechanics.

A That's correct.

Q And so forth.

MS. HARRISON: Rather than go down all the way through this, Your Honor, the flight training simulator you have seen.

BY MS. HARRISON:

Q There is a flight control center right on the Memphis air hub property; is there not?

A Yes. We have our own flight control center where we monitor the entire operational system of Federal Express on a 24-hour per day basis.

Federal Express has one of the most extensive aviation-related flight control activities, including our own weather, individuals who interpret the weather, which is far more important to us than even to a passenger carrier. Our system is thrown of[sic] by a factor of only 15 minutes on a given evening. The cost to Federal Express is tremendous in that we only have approximately two hours and 15 minutes for delivery of all these packages in the early a.m. We therefore — if you lose 15 minutes, you can tell what percentage of that traffic would be delivered late, would be delivered at a time later than our proposed time to our customer and I think someone mentioned earlier, we do refund the money to our customer if a late delivery is made.

The Meteorology Department actually carefully analyzes the weather at each aircraft location and if they deem there be a problem at any of those locations, they communicate with our flight operations group who then re-schedule[sic] — in fact, may re-schedule[sic] virtually the entire system in order to make certain that the system works well in spite of the fact that weather may be very difficult in certain areas, in the northeast, for instance.

We operate our system on an on-time basis, and that means on time, not within 15 minutes on on time, but absolutely on-time basis of approximately 98.5 percent of the time.

Q The spare aircraft you utilize — those are the chase planes, so to speak, we referred to earlier?

A There are descriptions of two or three different types of spare. One of the big differences in Federal Express, in the express industry and the passenger carriers is the Federal Express can't afford to cancel a flight. We do everything possible to keep from canceling a flight and delaying the transportation of — we have a total of nine aircraft that are designated spare aircraft. Many of the passenger carriers, Northwest, for instance, does not maintain even one spare aircraft in its operations.

Again, because of the military-like requirements that our system work absolutely, positively on time each night and that each package tendered to us make the hub sort in Memphis, Tennessee, we actually utilize a total of nine aircraft as spares in the system each day.

Q You have a separate quality control operations for your aircraft that's listed there. Let me pass you what's been pre-marked —

MS. HARRISON: And I apologize, Your Honor, pre-marked as Exhibit 11A because of the — I know Your Honor doesn't like sub-exhibits. It's part of this one. It wasn't intended that way.

THE COURT: That's all right.

THE WITNESS: Federal Express is very heavily regulated by the Federal Aviation Administration and the Department of TRansportation, as are all other air carriers. All of us have read extensively in the past and recent past about the problems of aviation and regulatory stance of the Federal Government.

In order to monitor our compliance with the various rules and regulations imposed upon us by the Federal Aviation Administration, which primarily have to do with safety of operation,

which have to do with the safe operation of aircraft, the appropriate training of mechanics who have to be certified by the FAA, pilots who are required to be certified by the FAA, we maintain an entire staff. As you can see, the training area of 29 instructors; the quality control which involves the monitoring of our compliance; 43 individuals are involved in that activity in the aviation area.

Certainly in the aircraft and ground support area, we again have to maintain the same quality of GE equipment as aircraft. If the equipment on the ground doesn't work to get it on the airplane, we've got to refund the money to the customer.

We also have a very extensive — I would think one of the most extensive development engineering groups, R&D groups in the aviation industry. Because again, Federal Express must accomplish its mission each evening. And in order to do so, when you understand what happens in the weather and it's very easy if you have listened to the news in Nashville, Nashville's weather was zero zero yesterday morning.

We do everything possible to assure that our aircrafts utilize equipment, the latest technology. We, in fact, go far beyond in the equipping of our aircraft, far beyond the equipment utilized by many passenger carriers. We even go further to the extent of trying to develop on our own systems that give us the ultimate in reliability.

You'll notice on Exhibit 11A certain activities in which Federal Express has been involved to upgrade the safety and reliability of our aircraft. Item number two. 727 100 Supermod was a project where we took aircraft — perfectly certified by the FAA and spent approximately $60,000 in refurbishing those aircraft so that the reliability and the safety factors of the aircraft were enhanced substantially.

As a matter of fact, those Boeing 727 100s coming out of the

Supermod are, in fact, better aircraft than they were when delivered new from Boeing, because and the industry having understood all of the various problems that might have existed with Boeing 727 aircraft throughout its history, corrected each of those problems, making it a far better airplane than that airplane was when new.

We have in our simulator — one of our simulator programs a heads-up cockpit display which is a new technology making landings in adverse weather much easier. We have, in fact, on one of our simulators a wind sheer program which FAA utilized when researching the Delta crash in Dallas to determine the effect of the wind sheer on what was an L10-11 flown by Delta—

THE COURT: Just a minute, Mr. Cloud.

Ms. Harrison: This is all very interesting, but I'm having some difficulty seeing the relevance.

MS: HARRISON: Your Honor, it's our position, as we stated in our trial brief, first of all, that Federal Express, one, is clearly an air carrier and operates an integrated system which is directed toward delivery of goods on time.

And what they do with regard to their airplanes to make sure they can fly, to make sure they can get goods there on time is part of the entire integrated system, and shows the character, status of that system.

THE COURT: Ms. Harrison, you move along now and don't go into all this great detail. This testimony is irrelevant to the issues before this Court in my judgment. I'm going to bear with you to some extent. But I want you to speed this thing along.

MS.Harrison: The remainder of the Exhibit 11A sets for the A description of the quality —

THE COURT: I've read Exhibit 11A, Ms. Harrison, and it's part of the record. Now move along.

BY MS. HARRISON:

Q I pass you what has been pre-marked Exhibit 12 and 13, picture and description of the Memphis superhub facility.

A Yes. Exhibit 12 is a picture of the superhub. This picture actually would have been taken on Thanksgiving Day which is the only day where all the Federal Express aircraft would be at the hub during the daylight hours.

Again, this picture quite simply depicts Federal Express' operation with all of its aircraft at the Memphis superhub which is located on the Memphis Airport, as you can see.

MS. HARRISON: Your honor, I move for introduction of Exhibit 12.

THE COURT: Received.

BY MS. HARRISON:

Q Exhibit 13 is an outline showing what the facilities are and the uses of those facilities at the Memphis airhub; is that correct?

A That is correct.

THE COURT: It will be received.

BY MS. HARRISON:

Q Now, on the picture, Exhibit 13 shows airplanes along the side of the U-shaped building and some planes behind that; is that correct?

A That's correct.

Q Where do the trucks to the extent they come in to this facility unload?

A Well, if you'll notice in the portion of the picture which I would say about 1:00 portion of the picture, there are a few trailers shown located at the top of the picture. Those vehicles would be unloaded at the rear of the hub. You're calling that the bottom of the "U". The trailers on which air cargo containers would be located and filled with packages would actually be transported by bus or by the vehicle itself to the back of the sort facility room.

Q The trailers containing the air cargo containers from the trucks come into the bottom of the "U", as well as containers from the airplanes in the back there?

A There are about five, as you can tell from the other exhibits, there are about five locations where air cargo containers are input into the system by aircraft, and at really a single point by truck.

Q We put on the easel, Mr. Cloud, an exhibit that has been pre-marked 14, a map of Tennessee and also you have before you a pre-marked Exhibit 15.

Looking at the map —

MR. WILLIS: Can Your Honor see that?

BY MS. HARRISON:

Q — map of Tennessee, can you use this to explain in general terms your operation in the State of Tennessee?

A Yes. The operation in Tennessee with the facilities already depicted on Exhibit 15 for identification, the operations in Tennessee center around three locations, Memphis, Nashville, and Knoxville. And actually, traffic is transported in three substantially different manners between those areas, and we'll start with the eastern portion of Tennessee which is primarily served by the Knoxville facility.

It's very difficult to see the blue line which depicts the service area of the Knoxville facility. But it runs along the border of

Tennessee and then approximately half-way between Nashville and Knoxville.

Q Come down, Mr. Cloud and illustrate it.

THE COURT: Mr. Throgmorton, there's a pointer over there somewhere I think.

MR. THROGMORTON: I was trying to find it. It's not over here, sir.

THE WITNESS: Okay. The service area of the Knoxville facility on where the truck aircraft operates from Knoxville to Memphis includes everything in Tennessee to the state line and everything east of the line beginning somewhere around Fayetteville I tracked here to the east of McMinnville, and up through Red Boiling Springs, Tennessee.

The Knoxville — and I'll go ahead and point out the other areas. the area served by the Nashville — primarily by the Nashville facility is bounded by that same line on the east of Nashville and the Tennessee River, and everything in that general area would be served by the Nashville Facility.

The remaining area would be served by Memphis or a facility at Jackson, Tennessee. The Memphis facility actually handles traffic up to and including approximately Covington. Everything else in West Tennessee and that western section of Tennessee is assembled and moved to Jackson for line haul transportation or truck transportation to Memphis.

And in that area, the described area surrounding Knoxville, the operation which is conducted on a daily basis in that area by each courier in that area would involve the pick-up of traffic from a number of sources, one, directly from customer premises; two, from drop boxes in the area; and three, from Federal Express facilities. All of that traffic would be loaded into air cargo

containers at the station locations which are listed in 15 and are included in that area. That primarily, as I recall, would be Chattanooga, Tennessee.

All traffic is loaded into the air cargo container, is then loaded on a CTV, which is a container transport vehicle utilized throughout our system to transport traffic to and from — primarily to and from aircraft or airports.

That CTV is designed — it is a totally different animal than anything operated by what is known as a general commodity trucking company in that it has a roll-a-bed capability so you can actually push air cargo containers on and off the truck. The unit itself is equipped with scales so that as a container is loaded or off-loaded from that vehicle, we can obtain the appropriate weight for the weight and balance activities on aircraft.

In any event, all of the traffic that is assembled in the eastern section of Tennessee is transported in air cargo containers to the Knoxville airport.

A 727 operates from Charleston, West Virginia into Knoxville, arrives Knoxville, all of the traffic, whether that traffic may move between two points in East Tennessee, or whether that traffic may move from a point in East Tennessee to anywhere on the world is bulk loaded onto those containers, loaded on the 727 in Knoxville and transported to the Memphis hub at which point the containers are off-loaded from the aircraft which I think you;ll see on the video.

In the middle portion of Tennessee, there is a different operation. Again, all of the traffic throughout the middle portion of Tennessee at the station is depicted in Exhibit 15.

THE COURT: Let me stop you for just a minute.

THE WITNESS: Yes, sir. That package would move — again, this is a system designed to accommodate traffic moving everywhere. And that system, in order to be an accurate system, forces us to do everything the same way. Even if it were moving between two points in Elizabethon, it would actually be transported to the Knoxville Airport, flown to Memphis, back to Knoxville and back to Elizabethon for delivery.

BY MS. HARRISON:

Q You're continuing on about the Nashville operation?

A The Nashville operation differs from the East Tennessee operation in that we utilize two different types of line haul truck transportation serving that Nashville area. We operate two CTV's each evening from Nashville, Tennessee, to Memphis, Tennessee. Again, after the traffic is consolidated precisely the same way in the Middle Tennessee area that's done that I described in East Tennessee. The early arriving containers or early arriving vans and traffic are loaded onto a CTV into an air cargo container, and into a CTV, the last one of those CTV's departs Nashville about 9:00 p.m. would arrive at Memphis somewhere around midnight. Again, the air cargo containers are off-loaded as are all air cargo containers at the airport in Memphis and put into the sort.

However, in order to give the late delivery which Federal Express really is know for throughout its system, we also operate each night a Cessna 208 from — it originates in Bowling Green, Kentucky; it flies into Nashville, I believe it arrives in Nashville at 10:15 and departs at 11:00 p.m. I'm not sure exactly what that schedule is.

But in any event, a departure time of 11:00 is made with the Cessna 208 each operating evening. Now that Cessna 208 transports all of the traffic which is assembled between approximately 8:30, 30 minutes prior to the departure of the CTV, and 11:00.

So traffic which originates in this middle portion of Tennessee can either move truck or it can move air. We never know from day to day whether the traffic — a particular shipment is going to move truck or whether it's going to move air.

Q It depends on what time the courier unloads.

A It's dependent — it's really dependent altogether on the system. If we have a demand for services by a customer in a given area, any one of the Nashville couriers can be making very late pick-ups and be required to put all the traffic that day from their vehicle onto the Cessna 208. We can't tell — Federal Express can't tell you at the start of the day or when we receive a request for a dispatch whether a particular shipment, particular item from, let's say, Murfreesboro, for instance, will move to Memphis by truck or whether that particular shipment will move by air.

As a matter of fact, on one day it can move truck and the next day it can move air. There's literally no way for us to predict what method of truck transportation will be utilized on any shipment that originates in the middle portion of Tennessee.

The majority of the traffic in terms of numbers would move on the two CTV's without any question. There would be approximately seven containers — I'm sorry, there would be approximately six containers of traffic, as I recall, moving from Nashville to Memphis on the truck, the Cessna 208 is capable of handling about 4,000 pounds of traffic each evening.

Q The CTV is a traffic transport vehicle.

A That's correct.

Q The flying spares that you talked about previously, depending upon the conditions in Nashville could also and have also stopped in Nashville and picked up the packages that would normally travel on the CTV's and move into Memphis also.

A On occasion, that would be necessary. I can't say how many times that's happened. But on occasion, it would be necessary. In particular, as related to the ice-type storms we're familiar with that happens here one or two times a year.

But in general terms, the Nashville market place is served by CTV, as well as the Cessna 208.

Q Moving on to West Tennessee beyond this blue line down to Memphis, back across the boundary of Tennessee, how is that area served?

A The western portion of Tennessee is served by the consolidation of traffic for every point in West Tennessee with the exception of cities located in the very — very near to Memphis, Millington and that sort of thing are all consolidated in our section in Jackson and loaded into cargo containers in Jackson, Tennessee, and moved from Jackson by CTV to the hub. This traffic we're talking about is very clearly set forth again in Exhibit 15. The volumes of traffic involved on an outbound basis per day would be from the state of Tennessee, 11,000, an average of 11,582 shipments —

Q Is that the entire state?

A That's from the entire state. That would be traffic moving from this entire state to points located throughout the world. And there would be included in that whatever volume of single-state traffic might have been generated by Federal Express in a given day.

Q Looking at Exhibit —

THE COURT: Wait until another question is asked, Mr. Cloud. You're a rather voluble witness. Wait and answer Ms. Harrison's question.

THE WITNESS: Okay, sir.

THE COURT: Quit making speeches.

BY MS. HARRISON:

Q Assuming the Public Service Commission — strike that.

In the last year or year and a half Federal Express has experienced two stops by the Public Service Commission; is that right?

A That is correct.

Q Where did it occur?

A It occurred in the Knoxville area. Two CTV's were stopped. One of the CTV's was delayed 45 minutes and one of the CTV's was delayed an hour and 15 minutes, which is approximately one-third of the delivery window on that traffic. All of that traffic, as has been explained, was interstate traffic. We necessarily missed the delivery on at least one-third of that interstate traffic.

If the Commission is allowed —

THE COURT: Wait, wait, wait, Mr. Cloud.

We're going to take a recess and I'll let Ms. Harrison confer with you. We're going to operate this thing on a question-and-answer basis.

We'll take a 15-minute recess.

Ms. Harrison, you confer with your witness.

MS. HARRISON: Yes, sir.

(Whereupon, court was recessed, then resumed, and the following proceedings were had:)

MR. WILLIS: Your Honor will permit me to speak to the court?

THE COURT: Yes, sir.

MR. WILLIS: Your Honor, I want to apologize to the court and Mr. Cloud. I'm afraid the matter that Your Honor interpreted to be Mr. Cloud turning onto an advocate on the witness stand as opposed to a factual witness, the blame for that can be placed at my feet. I visualized this case as being one where we needed to show the current organization and the current structure of Federal Express and what the impact would be upon Federal Express in the event it was determined that the Airline Deregulation Act did not preempt the type regulation being served by the Public Service Commission.

We realized we had an awful lot of material to get before Your Honor in a short period of time and our discussions with Mr. Cloud, we emphasized that one of the things he should express an opinion on would be the impact on the organization in the event the Public Service distinguish 191 parcels traveling in the State of Tennessee is going to do.

. . . .

It's our position that we've got exceptional circumstances all over the place, for abstention for undue burden and either under the Constitution or the 1302 and 1305, this Court must declare that the State has no right to regulate the rates, routes, and services of Federal Express.

THE COURT: Mr. Walker? Mr. Walker, you wanted to address the issue of res judicata. I'll hear you.

MR. WALKER: Thank you, Your Honor.

THE COURT: But you may also address the entire case.

MR. WALKER: Your Honor, the issue of abstention is no longer an issue in this case. There no longer is a pending State Court decision. There is no longer any reason for you to abstain to await the outcome of that decision.

The whole idea of the doctrine of abstention is that if you had agreed with us on abstention and waited until the States Court had ruled, then you would not have needed to address the merits of this case. In other words, there would have been a final decision of the States Court on the merits and that would have re Judicata application on those issues for these parties.

SUPPLEMENTAL APPENDIX I

TRANSCRIPT OF RECORD
Before the
TENNESSEE PUBLIC SERVICE COMMISSION
NASHVILLE, TENNESSEE

DOCKET NO SMC-977

IN THE MATTER OF:

SHOW CAUSE ORDER AGAINST FEDERAL EXPRESS CORPORATION

Nashville, Tennessee
September 24, 1986

MARGARET HEATH
Court Reporter

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[LARRY GLASSCOCK]

Q. Now you mentioned Federal Express as competitor, do you consider Federal Express as a competitor for Tennessee intrastate ground traffic?

A. Oh, absolutely, because we consider the market to be overnight and second day. The delivery of time sensitive materials, and because of their market share, they have to be considered the primary competitor.

Q. So you would not only say competitor, but primary competitor?

A. Absolutely.

Q. Now, what if any difference does it make that Purolator is regulated, as you have mentioned, on this Tennessee intrastate ground traffic and Federal Express is not?

A. Well, from a sales and marketing standpoint, it is a point of confusion, because we will go into a customer, or potential customer with pricing information, and in the case of a large national account, shipment volumes in the industry are primarily based on total volume. When Purolator Courier calls on a national account, for example, based in Nashville, we will offer them a discount on everything traveling outside the state, based on total shipment volume, which is consistent with the way most of the other companies price their discounts, but on the intrastate traffic, it is based solely on the number of shipments tendered per day, and it is quite possible that the customer has to pay higher price for a shipment moving from Nashville, Tennessee to Smyrna, Clarksville, Franklin, whatever, than they would on a package moving from here to New York. That's something that the customer finds difficult to accept. It is also an inconvenience for them, because in the case of a large account, they spend a significant amount of time auditing freight bills, and there is a certain amount of dues abuse that they look for when considering a transportation company.

Q. Does it cause any confusion in your own operation?

A. Well, yes, it does. As I mentioned we have a network of customer service centers located in Basking Ridge; Indianapolis, Indiana, and Dallas, Texas. Because of the Purolator Courier intrastate operating tariffs the rates, the varying size restrictions, and so forth, we have had to establish a network of specialty desks, and any time a customer call goes into the CSC, and the question is identified as involving an intrastate shipment, it is automatically referred to that desk. For example, if a customer is calling in requesting rate or size information, or service information from Nashville to Knoxville, he is automatically assigned to the specialty desk. If that customer then has a question about a package from Nashville to Los Angeles, California, it is called a switch-back to the normal customer service network, and it gets frustrating from time to time for a customer, because there is this constant switching back and forth, but we found that to be a necessary step to insure our compliance with the various operating authorities. Locally, it can be a problem, because of the difference in size and weight restriction between our regional and national products, and our intrastate products. For example, a customer that normally sends a 100 pound package out of the state to varying locations may bring a package into a terminal, or call in and request a pickup on a package that weighs 100 pounds, that is destined for Memphis, Tennessee. We can't handle that package, because that is outside of our operating authority.

Q. And does the. . .of course, being unregulated Federal Express has more flexibility and how it changes things. . .

A. Sure from a pricing standpoint, they have a great advantage. They can simply price to the levels necessary to close the account. One of the things that we ran into about a year and a half ago, we sought to increase our size and weight restrictions intrastate Tennessee to be consistent with our regional pricing philosophy and size restriction philosophy. We were simply following Federal's lead to 125 pounds, excuse me to large sizes.

Shortly after we filed that application and it was granted, they increased their size restriction to 125 pounds, and not long after that it went to 150 pounds. For us to follow that we have to file for that additional authority.

Q. The last time your removed your length and girth restriction and increased the aggregate weight from 100 to 300 pounds. What was involved in your accomplishing that?

A. Several months of time before the Commission; several, several witnesses involved, and an awful lot of expenses.

Q. You had several days of hearings in Memphis and in Nashville and in Knoxville?

A. That is correct.

Q. And Federal Express would not have to do that?

A. No, sir.

Q. What about in billing? Does Federal Express enjoy any advantages of being unregulated as far as billing practices?

A. Again one of the problems with an intrastate rating tariff is that we have to setup a separate billing module in our automated billing system. In other words any data that is input involving an intrastate Tennessee shipment is rated on a completely separate billing module to insure that the customer receives the correct intrastate Tennessee rate.

MR. SANFORD: You may cross examine.

CROSS EXAMINATION

BY MR. EVANS:

Q. Mr. Glasscock, first, does Purolator Courier hold any interstate authority from anybody in terms of a certificate or a permit that is issued specifically to Purolator? I am not talking

about can you operate under any exemptions, but do you hold any sort of authority as an air carrier?

A. As an air carrier?

Q. Yes.

A. Yes, sir, to the best of my knowledge we do.

Q. Sir?

A. I am not as familiar with that as Mr. Labrada would be. Maybe that question should be directed to him.

Q. You don't know whether you have any air authority?

A. I just don't feel like I am the proper person.

Q. You don't advertise as being an air certificated carrier?

A. Advertising is geared toward the overnight second day delivery of time sensitive materials. I don't know that there is any reference made to certification.

Q. You don't recall ever seeing any Purolator advertising which represented to the public that Purolator was a certificated carrier of some sort?

A. Not to the best of my knowledge, but again Mr. Labrada would be the correct person to address that.

Q. Well, being a regional supervisor, I would think that you would be generally familiar with it if there were any such advertising. Wouldn't you think so?

A. I don't recall any reference in advertising materials to an air certificate.

Q. Now, it is at your election that. . . . . .the essence of what you are telling us is that there are differences which arise between your situation and that of Federal Express because of

your being regulated by the Tennessee Commission, and Federal Express not being regulated. Isn't that correct?

A. Yes, sir.

Q. And Purolator made its own election to be regulated, did it not?

A. Yes, sir, our understanding. . . .yes, sir.

MR. EVANS: All right.

MR. SANFORD: Your Honor, please, I want to object to that question coming from counsel. Mr. Evans who is thoroughly experienced with the fact that the law controls. . . .it is not a matter of asking this lay witness some question of that nature. I don't think that is quite proper for a question. Mr. Evans well knows that the law determines whether Purolator complies, not Purolator's wishes as to whether or not it would comply.

ADM. JUDGE: Well, I think we have given the question far more attention than it deserves. Let's move on.

MR. EVANS: Sir:

ADM. JUDGE: I think we have give the question far more attention than it deserves. Let's move on.

A. Sir, when I joined the company six years ago we were a regulated carrier.

Q. You didn't personally make the election to be regulated. Is that what you are telling me?

A. No, sir, but I do my best to make sure that we comply with that regulation.

Q. To the extent you understand you have to comply?

A. Yes, sir.

Q. Now, are there any alternate ways that you can handle the shipment in alternate rates on which you handle a shipment going between any two points in Tennessee which depend upon, or vary according to the manner of packaging of the shipment?

A. There is an optional portion in the tariff that allows us to price a PuroLetter on PuroPack separately from general commodities shipments, if that is what you are referring to.

Q. Well, if it is in one of those Purolator envelopes it is priced differently?

A. No, sir.

Q. Is that what PuroPack is?

A. Yes, sir, that is a company provided container, but in the Central and Eastern Tennessee area, the billing office in Nashville is responsible for . . . .every customer is rated, based on the general commodities rate tariff.

Q. Are you saying that the Central and East Tennessee, there are no shipments handled intrastate accept on the general tariff?

A. The general commodity tariff, yes, that is true.

Q. And if there is no variation in that, dependent upon that, either that or any other tariff, that you handle that shipment under. . . .dependent on whether or not it is in one of your packs?

A. That is correct.

Q. And do you have an alternative way of shipping, let's say, between Nashville and Knoxville conceivably going through Indianapolis by air?

A. It is an alternative, you know, for example, if there were bad luck and the roads were closed during the winter, sure if the plan flys and the truck doesn't run we are going to fly that package through Indianapolis, because service comes first. Normally that

is not an option of this exercise, because the vehicle that services the Knoxville area doesn't leave Nashville until over an hour and a half after the airplane has departed.

Q. Does the rate vary depending upon whether it moved by air?

A. No, sir.

Q. The rate is not any different whether it moves by air or ground, between any two points in Tennessee?

A. No, sir.

Q. The rate is not any different between any two points in Tennessee whether it moves in a Purolator Pack envelope or does not move in such an envelope?

A. No, sir, and as far as moving the package late at night, that is simply to allow us to be competitive with the Airbornes, the Emory's and the Federal Express' who also offer late pickups. It is also rated as an intrastate shipment to reduce the confusion to the customer, because otherwise the customer would be given a price on a package picked up, let's say if until 8:00 o'clock at night. If he tenders a package after that, there will be a premium on that package because it would be billed at a higher rate.

Q. Well, that is what I wanted to ask you. Do you have two different charges?

A. No, sir.

Q. Wait a minute. . . . .both of them reflected in your tariff are the two different charges, intrastate shipments depending upon what time of day pickup is requested and made?

A. No, sir.

Q. Well, what is the premium you said for after 10:00 o'clock?

A. I am saying if a package because it was picked up at 10:00 O'clock in Knoxville, Tennessee, and moved via Indianapolis to Memphis, if you are suggesting that that is to be rated as an air shipment or a regional shipment. . . .

Q. Excuse me. I am not suggesting anything. I am just trying to get to the bottom of how you do it.

A. We think that that is too confusing to the customer, and we should rate it as an intrastate shipment.

Q. And your intrastate shipments have one charge, and only one charge. . . .

A. Yes, sir.

Q. . . . . .regardless of how they move between points in Tennessee, and regardless of how they are packed, and regardless of the time of day they are picked up, or the time of day they move?

A. That is correct.

Q. Are you familiar with your tariff in Tennessee?

A. Yes, sir.

Q. Have you. . . .or could you tell us without having it before, or do you want to take a look at this tariff, I am about to ask you a question about?

A. I am sure you are going to ask me about the Purolator or PuroPack portion of the tariff.

Q. Price for Purolator envelopes, priority regional Purolator letter service. This is in Section 2, captioned Specific Commodity or Service Rates. Now, does not this tariff provision, revised page 34, provide for different prices based upon packages in a Purolator envelope?

A. Yes, sir, it does, but when that was introduced into the tariff, I was told that that was an optional rate item and we do not charge them. The reason is. . . .there are three things that are throughout this market - service quality, ease of using and pricing. Service quality is, again going back to late pickups, and moving shipments from Point A to Point B, the way the customer wants. Ease of use involves rating. Customer service options and that type of thing, and pricing needs to be as simple as possible, and we are not charging a separate price for a Purolator in a PuroPack move.

[ARMANDO LABRADA]

A. My name is Armando Labrada.

Q. And you might spell that for the court reporter.

A. It is A-r-m-a-n-d-o L-a-b-r-a-d-a. I work at 131 Morristown Road, Basking Ridge, New Jersey for Purolator Courier Corp.

Q. You might spell Basking for the reporter.

A. B-a-s-k-i-n-g Ridge.

Q. And you work for Purolator?

A. Yes, sir.

Q. And what is your present position?

A. My present position is Vice President and Associate General Counsel Assistant Secretary for Purolator Courier Corp.

Q. And what generally are your duties and responsibilities in that position?

A. Generally I am responsible for the legal affairs of the whole company, which includes our automotive products group, so far as they arise from the operations of the company. In that capacity I am responsible for counseling management on marketing, regulatory matters, international developments and labor law and unemployment matters.

. . . .

Q. Now you heard Mr. Glasscock testify as to some of the difficulties that Purolator has encountered on a Tennessee basis as a result of being regulated while Federal Express is not. Could ;you add anything to that?

A. No. I would just confirm those difficulties particularly as a legal advisor, it is sometimes hard to explain to our marketing people why in some cases they may have to charge a higher price for a shipment that is traveling a shorter distance to the same account who is giving us shipments that are going to California, or even further distances, why we can't have a uniform rate structure for people? Why we can't. . . . .why our advertising has to have disclaimers? Why we have to have complicated billing systems, etc.

Q. Now what is Purolator's position with respect to the matters at issue in this proceeding?

A. Well, Purolator's approach to intrastate regulation has traditionally been pragmatic rather than ideological. In those states where we have to comply we have complied with the system. We have taken advantage of it when it protects us from entrance.

ADM. JUDGE: Very well. I will permit the question.

MR. EVANS: Would you please explain to us the justification, and how it is that you apply. . .you have those two different rates, and your regional manager said, as I understood him, that we were told not to use this. . .disregard it, but there it is. Have you used it or have you disregarded it?

A. Let me try to give you some background on it, at least my knowledge of that process. In early 1984 we marketed PuroLetterrs as an air product that was supposed to move by air and were priced at a uniform price to every customer in the country

whether it went two miles or seven miles. Our marketing people and our sales people found very reluctant. . . . .at the same time we adopted the policy if movement in those containers was within a border of a state that was regulated, they were to apply the tariff within those states. So that if somebody put something in a PuroLetter and it weighed one pound that resulted in an $8.00 charge, as opposed to the $14.00 charge that we were going to charge them for going across the state border, we would comply with the state requirement and rate that as an intrastate shipment regardless of the container. In late '84, early '85, the marketing people wanted to market a national PuroLetter product, and have a uniform simple. . .simplified price point that they could advertise, and say, you know, for Purolator "X" price anywhere in the country. In order to be able to do that, I advised them that they had to file tariffs in each of the states where they wanted to do that for an intrastate movement, and distinguish a PuroLetter from a regular general commodity type movement. When we did that there was tremendous resistance on the part of customers saying, well, wait a minute, if I put it in a brown. . . .in my own envelope you have to charge $8.00, but if I put it in your envelope you are going to charge me $12.50 or whatever the price is at the time. At that point, I said, as far as I am concerned you have the flexibility to charge the customer the lowest price that he is entitled to under a regulatory scheme; therefore, I couldn't see why someone would ever complain that we didn't charge them a higher price.

MR. EVANS: So if you put this in for the purpose of your national advertising program. . . . .

A. We are in the process of withdrawing those tariffs, and then deciding whether we are going to fly all of the PuroLetters to Indy and back. Maybe we will use. . . .maybe in fact the carriage of letters of PuroLetters is exempt from state regulation under the Postal Preemption Statute.

Q. Well, is that the position you take?

A. We don't know. We haven't made a final decision on that.

Q. Well, for the time being is it your testimony that you are going back to one tariff, one rate, only one charge for the Tennessee intra?

A. Yes. If we withdraw the PuroLetter and PuroPack problems. . . .I mean the tariffs, packages moving intrastate will be rated according to the intrastate tariff regardless of the container that is being used for those shipments.

Q. And that is what you are doing now, isn't it?

A. Yes, sir. Unless we are free to do otherwise.

Q. Sir?

A. I mean in an unregulated state we would charge the highest price we could, you know, get from the customer who is willing to pay.

Q. Well, in this case you have treated this as unregulated, haven't you?

A. No, we tried to comply by filing tariffs in those states which purported to regulate. That is where the problem was. When we tried in effect to raise the price to customers who were paying low or local prices for regular packages, the marketing decision, we said, well we will charge the lowest price.

MR. EVANS: I think that is all.

MR. SCHOLES: I just have a couple of questions.

CROSS EXAMINATION

BY MR. SCHOLES:

Q. Is the option as far as the PuroLetters and the PuroPacks that you were talking about, that option is not included in the language of the tariff, is it? That you could either go under the general commodity or under the PuroLetter?

A. I am not intricately familiar with that specific language of the tariff.

Q. That is something that you instructed in this. It doens't appear on the face of the tariff?

A. It was an attempt to try to charge a higher price for a national product, which met with considerable consumer resistance. We could have just withdrawn the tariff, but, you know, and we are in the process probably of doing that in any case, and just say we are either going to fly them all to Indy and charge any price we want, or we will treat them just as a container, as a wrapper when it moves within the same state, and at our. . .you know. . . .we will have to make those operational and marketing decisions.

Q. The only other question I have is I am not real clear on the type of certificate that you describe that you got from the FAA which you think is going to be revoked at any time. Was that under Section 4 of the. . .

A. I think it is. . .yes, sometimes I get lost in the jargon, but it was, I believe a 418 certificate exempting us from compliance with 121 of the FAA Act which has all of the operational control of aircraft, so that we could argue at some point that we were an air carrier, a direct. . .I mean a certificated air carrier, and our primary motivation for that was labor strategy which would have given us the flexibility of putting us under the Railway Labor Act as opposed to the National Labor Relations Act if it became desirable for us to do that. We have abandoned that strategy. And

it was an interim step before we actually planned to have our own pilots and operate the planes direct. Another strategy which we have abandoned.

MR. SCHOLES: I have no further questions.

MR. SANFORD: I have nothing further.

ADM. JUDGE: I thank you. Anything else? Anything further to present? Any rebuttal? Anything from the staff? Any more witnesses? I see.

MR. SANFORD: We are ready for Your Honor to decide.

ADM. JUDGE: I don't think I will decide today. Would you all like to present anything like proposed initial orders?

MR. EVANS: I think we should submit a reply brief. We were handed a brief this morning. . .

ADM. JUDGE: Yes.

MR. EVANS: I think we are entitled to comment on that as well as the opinions expressed from the stand.

ADM. JUDGE: Well, would we like to . . . let's see we have got this brief.

MR. SANFORD: You had that. . . .their response is what the brief is replying to. They handed us that the day of the hearing, the last time, so we thought turn about was fair play.

ADM. JUDGE: I see.

MR. EVANS: Shouldn't we put the briefs in terms of proposed orders?

ADM. JUDGE: Let's put future briefs in the form of proposed initial orders. Do you all need the transcript for the hearing today?

MR. SANFORD: Yes, I will.

MR. EVANS: We should have that. There are some things in there we want.

ADM. JUDGE: Very well then. Due 30 days after the transcript is completed. How does that sound?

MR. SANFORD: Thirty days?

ADM. JUDGE: Would you prefer another time frame?

MR. SANFORD: No that is all right with me.

MR. EVANS: That ought to be long enough.

ADM. JUDGE: Very well then, we will make it due 30 days after the transcript is completed. Anything further to be taken up at this time? Very well, then, I look forward to your proposed initial orders, and we are hereby adjourned.

(WHEREUPON at approximately 11:30 a.m. hearing was adjourned).

SUPPLEMENTAL APPENDIX J

EXHIBIT 3 TO SEPTEMBER 10, 1987 HEARING

VOLUME VI

CERTIFICATE OF CONVENIENCE & NECESSITY NO. 2083-2-Z

2083-2-Z

Authorizing the transportation of general commodities except commodities in bulk, classes A and B explosives, household goods, and commodities requiring special equipment and subject to the restrictions shown below, moving in courier service over irregular routes between all points and places in the State of Tennessee. "Courier service" is defined as the expeditious transportation, including pick-up from shippers' premises or vault, and delivery to consignees' premises or vault of packages and articles on a regular schedule, or on call by the shipper. Service hereunder is limited to the transportation of packages or articles not to exceed 75 pounds each in weight, and weighing in the aggregate no more than 100 pounds, from any one consignee at one location in one day. Packages or articles shall not exceed 108 inches in length and girth combined. Pick-up and delivery shall be completed substantially within a twelve-hour period, or by noon of the day following pick-up. Service shall be restricted to pick-up and delivery of packages or articles to, from or between business addresses, or security vault locations, or for business purposes; provided business purposes shall not include packages to or from retailers and residences of customers of retailers, where such residence is not also used as the customer's place of business.

DOCKET NO. MC-4433 Sub 63
ORDER DATED May 19, 1976

2. That Certificate of Convenience and Necessity No. 2083-2-Z heretofore issued to Purolator Courier Corporation be, and the same is hereby, modified by deleting the length and girth restriction and by increasing the aggregate weight restriction from 100 pounds to 300 pounds.

Order dated December 27, 1984

CERTIFICATE NO. 2083-1-Z

Authorizing the transportation in intrastate commerce of the following commodities between all points and places within the State of Tennessee:

(1) Prosthetic devices, external and implantable cardiac pace-makers and related accessories;

(2) Pharmaceuticals (restricted to movements from, to or between medical or dental offices or facilities), laboratory shipments of chemicals, laboratory samples of drug products, human and animal laboratory specimen; samples and specimens of agricultural products;

(3) Opthalmic good;

(4) Denture bites, articulators, impression molds and related commodities used in dentistry;

(5) Medical, laboratory, and industrial testing instruments and replacement parts;

(6) Critical replacement parts, supplies, and assemblies used to maintain data processing and word processing equipment;

(7) Designs, blueprints, engineering drawings, accompanying documents and laboratory test reports, engineering tracings and prints; engineering specifications, engineering calculations, and engineering samples;

(8) Proofs, cuts, copy artwork, layouts, mats, video tapes, film and materials related thereto used in preparing advertising;

(9) Small parts used in the manufacture, replacement and servicing of computer, calculator typewriter and photo

reproduction equipment (restricted against the transportation of commodities or articles weighing in the aggregate more than 75 pounds from any one consignor to one consignee in any one day);

(10) Electric supplies, household appliances and electric accounting machine parts (restricted against the transportation of packages or articles weighing in the aggregate more than 75 pounds from any one consignor to one consignee on any one day);

(11) Critical replacement parts (restricted to exclude automotive parts and any other parts originating at an automotive supplier, and further restricted against the transportation of packages or articles weighing in the aggregate more than 50 pounds from any one consignor to any one consignee on any one day);

(12) Garments, including without limitation, shoes and boots, swatches of cloth, leather and other material used in the apparel trades, for samples, testing or research purposes (restricted against the transportation of packages or articles weighing in the aggregate more than 100 pounds from any one consignor to any one consignee on any one day);

(13) Cut flowers, decorative greens and related floral supplies;

(14) Whole human blood and blood derivatives.

DOCKET NO. MC-4433 Sub 40
ORDER DATED January 10, 1975

CERTIFICATE NO.
2093

Transportation of commercial papers, documents, written instruments, business records and microfilm, excluding coin and currency, bullion and negotiable securities, originating at or destined to banks or banking institutions, between all points and places in the State of Tennessee, over irregular routes.

DOCKET NO. MC-4433
ORDER DATED April 2, 1973

Transferred from American Courier Corporation

2093-A Transportation of exposed and processed film and prints, complementary replacement film, incidental dealer handling supplies and advertising literature moving therewith (excluding motion picture films used primarily for commercial theater and television exhibition); business records, audit and accounting media of all kinds, moving to a point for processing, or from a point following processing, between all points and places in the State of Tennessee, over irregular routes.

DOCKET NO. MC-4433 SUB 1
ORDER DATED April 2, 1973

Transferred from American Courier Corporation

Purolator Courier Terminal Information

1122 Lebanon Road	3977 East Raines Road	196 Gill Street
Nashville, 37210	Memphis, 38118	Jackson, 38301
87 Courier Guards	48 Courier Guards	14 Courier Guards
22 Clerical	16 Clerical	1 Clerk
1 Comm. Specialist	1 Comm. Specialist	1 Service Sup.
1 Billing Supervisor	3 Service Supervisors	
3 Service Supervisors	1 Billing Supervisor	
4 Management	4 Management	
3 Sales Representatives	2 Sales Representatives	
2 Mechanics	2 Mechanics	
123 Total Employees	77 Total Employees	16 Total Employees
52 Vehicles	38 Vehicles	12 Vehicles
1429 Ault Rd.	1415 Stuart St.	Rt. 7 Shipley Fry
Knoxville, 37914	Chattanooga, 37406	Blountville, 37617
44 Courier Guards	23 Courier Guards	15 Courier Guards
5 Clerical	1 Service Supervisor	1 Clerical
1 Management		
2 Sales Representatives		
1 Mechanic		
55 Total Employees	26 Total Employees	17 Total Employees
25 Vehicles	13 Vehicles	12 Vehicles

314 Total Employees
152 Vehicles
2 Aircraft YS-11 (MEM/BNA to IND and Return)
G-1 (TYS to IND and Return)

Purolator Courier Terminal Information

1122 Lebanon Road	3977 East Raines Road	196 Gill Street
Nashville, 37210	Memphis, 38118	Jackson, 38301
87 Courier Guards	48 Courier Guards	14 Courier Guards
22 Clerical	16 Clerical	1 Clerk
1 Comm. Specialist	1 Comm. Specialist	1 Service Sup.
1 Billing Supervisor	3 Service Supervisors	
3 Service Supervisors	1 Billing Supervisor	
4 Management	4 Management	
3 Sales Representatives	2 Sales Representatives	
2 Mechanics	2 Mechanics	
123 Total Employees	77 Total Employees	16 Total Employees
52 Vehicles	38 Vehicles	12 Vehicles
1429 Ault Rd.	1415 Stuart St.	Rt. 7 Shipley Fry
Knoxville, 37914	Chattanooga, 37406	Blountville, 37617
44 Courier Guards	23 Courier Guards	15 Courier Guards
5 Clerical	1 Service Supervisor	1 Service Sup.
2 Service Supervisor	2 Clerical	1 Clerical
1 Management		
2 Sales Representatives		
1 Mechanic		
55 Total Employees	26 Total Employees	17 Total Employees
25 Vehicles	13 Vehicles	12 Vehicles

314 Total Employees
152 Vehicles
2 Aircraft YS-11 (MEM/BNA to IND and Return)
G-1 (TYS to IND and Return)

SUPPLEMENTAL APPENDIX K

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

CASE NO. 3-87-0633

FEDERAL EXPRESS CORPORATION
Plaintiff,

v.

TENNESSEE PUBLIC SERVICE COMMISSION, *ET AL.*.
Defendants.

SUPPLEMENTAL, BRIEF OF THE TENNESSEE PUBLIC SERVICE COMMISSION ON ABSTENTION AND *RES JUDICATA*

Henry Walker
General Counsel
Tennessee Public Service Commission
460 James Robertson Parkway
Nashville, Tennessee 37219
615/741-3191

Attorney for Defendant,
Tennessee Public Service Commission

November 11, 1987

Introduction

Counsel for the Commission apologizes to the Court for two errors committed during the first round of briefs and arguments in this proceeding.

First, the Commission's pretrial brief on the abstention issue focused only on the *Burford* doctrine;[1] subsequent research has shown that the *Younger* abstention principle[2] is not only more applicable but, in fact, determinative of these proceedings.

The Sixth Circuit ruled last year in an unpublished decision that the *Younger* doctrine compelled the federal district court to dismiss a complaint brought against the Kentucky Public Service Commission. In that case, as here, the plaintiffs urged that federal law preempted the Commission's jurisdiction. There, as here, the plaintiffs also filed a state court appeal raising those preemption arguments. This case, a copy of which is attached, is discussed further below.

Counsel's second error was to assert during argument that plaintiff's sudden dismissal of its state court appeal mooted the abstention issue.

Further research has shown that the rule in the Sixth Circuit,[3] recently affirmed by the U.S. Supreme Court in the *Pennzoil* case,[4] is that the *Younger* doctrine is applicable if, at the time of filing the federal complaint, the plaintiff has the opportunity to raise his constitutional arguments in a state judicial proceeding. Other Supreme Court decisions have held that a plaintiff may not avoid

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[1] *Burford v. Sun Oil*, 319 U.S. 315 (1943), discussed in the Commission's earlier brief.

[2] *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L.Ed. 2d 669 (1971).

[3] *Zalmon v. Armstrong*, 802 F. 2d 199 (6th Cir. 1986).

[4] *Pennzoil Co. v. Texaco*, 481 U.S. __, 95 L.Ed. 1, 20 (1987).

the mandatory application of *Younger* by failing to pursue his state court appeals. These holdings are also discussed below.

Only if the Court finds the abstention doctrine inapplicable does the *res judicata* issue arise. The Commission's ruling on plaintiff's claim should bind this Court to the same extent it would bind a state court in a subsequent suit between these parties. The second section of the brief deals with the *res judicata* question.

I. *Abstention*

The abstention doctrine first enunciated in *Younger v. Harris*, and its progeny "represents a 'strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances.' *Middlesex County Ethics Comm. v. Garden State Bar Association*, 457 U.S. 432, 102 S. Ct. 2515, 73 L.Ed. 2d 116 (1982)." *Parker v. Comm. of Kentucky Board of Dentistry*, 818 F. 2d 504, 507 (6th Cir. 1987). The doctrine applies equally to pending state administrative proceedings. *Ohio Civil Rights Commission v. Dayton Schools*, 477 U.S. __, 91 L.Ed. 2d 512 (1986). Quoting from the *Younger* decision, the Sixth Circuit noted in *Parker* that the "normal thing to do when federal courts are asked to enjoin pending proceedings in state court is not to issue such injunctions." *Parker, supra*, at 507.

Younger abstention, "born in a criminal context," is now "fully applicable to noncriminal judicial proceedings when important state interests are involved." *Middlesex, supra*, 73 L.Ed. 2d at 124. If important state interests are implicated in the ongoing state proceeding, federal courts should abstain "unless state law clearly bars the interposition of the constitutional claims." *Moore v. Sims*, 442 U.S. 415, 99 S. Ct. 2371, 60 L.Ed. 2d 994 (1979), quoted in *Blue Cross and Blue Shield of Michigan v. Baerwaldt*, 726 F. 2d 296, at 299 (6th Cir. 1984); See *Flynt v. Leis*, 574 F. 2d 874, 879-882 (6th Cir., 1978); reversed on other

grounds, 439 U.S. 438, 99 S. Ct. 968, 58 L.Ed. 2d 717 (1979); *Zalmon v. Armstrong, supra*, 802 F 2d at 201-202.

In *Parker*, the Sixth Circuit ruled that *Younger* compels the federal courts to dismiss plaintiff's suit [5] if (1) there are pending state judicial or administrative proceedings, (2) the state proceedings involve an important state interest; and (3) the state proceedings provide the federal plaintiff an adequate opportunity to raise his constitutional claims. *Parker, supra*, 818 F. 2d at 508.

In its petition for declaratory and injunctive relief, Federal Express asked this Court to prohibit the Tennessee Public Service Commission from enforcing state law governing the regulation of intrastate motor carriers. At the same time, Federal Express sought identical relief from the Tennessee Court of Appeals by filing a petition for review of the Commission's order pursuant to T.C.A. § 4-5-322(b) and seeking a stay of that order pursuant to T.C.A. § 4-5-322(c).[6]

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[5] "Where a case is properly within this category of cases, there is no discretion to grant injunctive relief." *Colorado River v. U.S.*, 424 U.S. 800, 816 n.22, 96 S. Ct. 1236, 1246 n.22, 47 L.Ed. 2d 483. "If the state raises the point and it is found that relief is barred by *Younger*, the federal court must dismiss the action." Wright and Miller, *Federal Practice and Procedure*, § 4252, p. 548. If injunctive relief is barred on *Younger* principles, relief by way of a declaratory judgment is also barred. *Id.*, at p. 547, citing *Samuels v. Mackell*, 401 U.S. 66, 91 S. Ct. 764, 27 L.Ed. 2d 688.

[6] The Tennessee Uniform Administrative Procedures Act provides that all appeals of the Commission decisions are heard first by the Middle Section of the Tennessee Court of Appeals. Appeals of decisions by other agencies must be filed in the Davidson County Chancery Court. T.C.A. § 4-5-322(b) (1987 Supplement).

Clearly the state has an important interest in the enforcement of its laws and the regulation of intrastate motor carriers.[7] Similarly, it is not disputed that the plaintiff had an adequate opportunity to raise and litigate its constitutional arguments both before the Commission and in its state court appeal. See *Ohio Civil Rights Commission, supra*, 91 L.Ed. 2d at 522-523; *Blue Cross, supra*, 726 F. 2d at 300 (holding that "clearly Michigan law provides an ample opportunity for Blue Cross to raise its constitutional claims in the same state court proceedings in which the other aspects of the Commissioner's order are challenged."[8]) Federal Express has not attempted to demonstrate "bad faith, harassment or some extraordinary circumstance that would make abstention inappropriate." *Id.*, quoting *Middlesex, supra.*

The abstention issue is not mooted by the fact that Federal Express dismissed its state court appeal before that court could issue a decision on the merits of plaintiff's arguments.[9]

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[7] The state's interest and purpose in regulating intrastate motor carriers is set forth in T.C.A. § 65-15-101. See *McCanless v. Southeastern Greyhound Lines*, 162 S.W. 2d 370 (Tenn. 1942); *Eichholz v. Public Service Commission of Missouri*, 306 U.S. 268, 59 S. Ct. 532, 83 L.Ed. 641 (1939). There is apparently no dispute that, but for plaintiff's constitutional arguments, Federal Express is an intrastate motor carrier subject to the Commission's regulatory jurisdiction. Trial Transcript, p.2. See T.C.A. § 65-15-107(a). The willful failure to operate without a certificate of convenience and necessity issued by the Commission is a criminal misdemeanor. T.C.A. § 65-15-322(a).

[8] Tennessee, like Michigan, provides for judicial review of agency decisions and requires that such decisions be reversed if found to be "in violation of constitutional or statutory provisions" or "in excess of the statutory authority of the agency." T.C.A. § 4-5-322(h).

[9] The state court denied plaintiff's motion for a stay on the agency's decision "on condition that compliance with said order of the Public Service Commission will not prejudice the prosecution of the present proceeding for

(Footnote 9 continued on next page)

The Supreme Court ruled seven months ago in the *Pennzoil* case that the *Younger* doctrine barred Texaco, the federal plaintiff, from raising in federal court various constitutional claims which the company could have raised in the state courts but had failed to do so. Addressing the procedural status of the parties as it existed on the day when the federal suit was filed, the Court held *Younger* fully applicable even though Texaco apparently late waived the right to litigate its constitutional claims in the state courts. *Pennzoil, supra*, 95 L.Ed. 2d at 19-20. ("Texaco cannot escape *Younger* abstention by failing to assert its state remedies in a timely manner.")

Similarly, the Court held in *Huffman v. Pursue*, 420 U.S. 592, 95 S. Ct. 1200, 43 L.Ed. 2d 482, 496 n.22 (1975) that "appellee may not avoid the standards of *Younger* simply by failing to comply with the procedures for perfecting its appeal within the Ohio judicial system," and stated in *Moore v. Sims, supra*, 60 L.Ed. 2d 994, at 1007, "Here it is abundantly clear that appellees had an *opportunity* to present their federal claims in the state proceedings. No more is required to invoke *Younger* abstention."

Relying on *Huffman* and anticipating *Pennzoil*, the Sixth Circuit ruled last year that "the proper time for determining the

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(Footnote 9 continued)

review of said order." Order of the Court of Appeals issued August 6, 1987. As explained to this Court during oral argument (transcript, p. 3), the Commission had ordered Federal Express to make application for a certificate of convenience and necessity but had ruled that the company could continue to operate without a certificate while its application was pending. The Commission then argued successfully to the Court of Appeals that no stay was necessary since the mere filing of an application would not interfere with the operations of Federal Express or prejudice the ongoing appeal of the Commission's order. The state court also presumably considered the relative likelihood of whether Federal Express would prevail on the merits of its claims. Plaintiff filed suit in this Court on August 7, 1987, the day after the stay was denied.

applicability of *Younger* abstention is the time that the federal complaint is filed." *Zalmon, supra*, 802 F. 2d at 204. The *Zalmon* decision also noted, quoting *Huffman*, that "a necessary concomitant of *Younger* is that a party . . . must exhaust his state appellate remedies before seeking relief in the District Court." *Id.* at 205 n.7.

Federal Express filed its state court appeal on July 9, 1987. That appeal was dismissed on September 12, 1987. This federal suit was filed on August 7, 1987, and tried on September 10 and 11, 1987. In light of *Pennzoil, Huffman*, and *Zalmon*, the *Younger* doctrine plainly applies to this proceeding despite the decision by Federal Express to dismiss its state court appeal.[10]

The only serious argument against applying *Younger* to this case is that abstention is inappropriate where, as here, the plaintiff alleges that the state proceedings have been preempted by federal law.

Nothing in any of the Supreme Court's line of decisions explaining the *Younger* doctrine indicates that the principles of comity and federalism are inapplicable if a plaintiff raises a preemption claim. Nevertheless, the courts of appeal are split on

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[10] At trial, plaintiff's attorney said that Federal Express withdrew its state appeal because the state court had refused to grant a stay. ("We couldn't get the relief we needed over there." Tr. p. 10) But this Court may not "substitute itself for the State's appellate courts." *Huffman v. Pursue, supra*, 43 L.Ed. 2d at 495. That the state court denied injunctive relief has nothing to do with *Younger*. Plaintiff's remedy, if any, lay in the Tennessee Supreme Court, not here. See *Dermott v. Toyota*, 487 F. Supp. 484, 486 (E.D. Tenn., 1980) in which the plaintiff dismissed his state suit and filed a federal one because the state judge had indicated that the plaintiff's suit had little merit. Accusing the plaintiff of blatant "forum shopping," the federal court dismissed the federal suit, holding, "We are not designed to sit in judgment over state courts, nor to second guess the studied opinions of the state court judges.

the issue, and counsel is aware of no Supreme Court decision directly on point.[11]

Three Circuits have held that *Younger* does not apply where the federal plaintiff alleges that state proceedings have been preempted by federal law. See *Baggett v. Dept. of Professional Regulation*, 717 F.2d 521 (11th Cir., 1983) (*Younger* inapplicable where "preemption is readily apparent" but federal question is one of preemption, abstention under the principle of *Younger v. Harris* is never appropriate"); *Middle South v. Arkansas Public Service Commission*, 772 F. 2d 404, 417 (9th Cir., 1985) (relying on *Baggett, supra*, and a Ninth Circuit decision, *Champion International v. Brown*, 713 F. 2d 1406 (1984)[12]); *Kentucky West Virginia Gas Company v. Penn. Public Utility Commission*, 791 F 2d 1111 (3rd Cir., 1986) (relying on *Baggett, Middle South*, and *Champion* but cautioning that *Younger* may sometimes be appropriate despite a preemption issue).

On the other hand, the Fourth, Fifth, and Sixth Circuits have ruled that, for *Younger* purposes, a preemption claim is no different than any other constitutional argument. See *New Orleans Public Service Comm. v. City of New Orleans*, 798 F.2d 858 (5th Cir. 1986) (a lengthy discussion of abstention under both *Younger* and *Burford* which holds that both apply to preemption claims); *Potomac Electric Power Co. v. Sachs*, 802 F.2d 1527, 1531, n.7) (4th Cir. 1986) ("It would strike us as anomalous to hold that a state court may decide federal constitutional issues but is unqualified or inhibited from deciding preemption issues.");

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[11] In *Brown v. Hotel Employees*, 468 U.S. 491, 104 S. Ct. 3179, 82 L.Ed. 373 (1984), the Court implied that *Younger* abstention would be applicable to a preemption claim but was not determinative in that case because the State had waived the *Younger* defense. 82 L.Ed. 2d at p. 382 n.9.

[12] The rule in the Ninth Circuit has apparently now changed. See *Martori Bros. Distributors v. James Massengale*, 781 F.2d 1349 (1986) and *United States v. State of California*, 639 F. Supp. 199, 204-207 (E.D. Cal., 1986).

American Electric Power Company v. Kentucky Public Service Commission, 787 F. 2d 588 (table) (6th Cir., 1986) (holding that *Younger*, but not *Burford*, applies to a preemption claim.)

The Sixth Circuit's unpublished decision in *American Electric Power* is based on legal and factual circumstances virtually identical to the case at bar. The plaintiff, and electric utility, litigated and lost a rate issue in proceedings before the Kentucky Public Service Commission. Claiming that the Commission authority on that issue had been preempted by the Federal Power Act, the utility filed a federal lawsuit raising the preemption argument and, a few days later, also filed an appeal of the Commission's decision in the Kentucky state courts. In a *per curiam* opinion, the Court ruled that *Younger*, but not *Burford*, compelled the federal courts to dismiss the federal suit. The Court said there was "little question" that the regulation of electric rates was an important state interest or that state appellate remedies provided the utility an adequate opportunity to raise its Constitutional challenges. (In concurring opinions, one judge concluded that both *Burford* and *Younger* applied. The other judge held that *Younger* did not apply because the utility was a plaintiff, not a defendant, in the state court appeal but that *Burford* compelled abstention in any event.)

The *American Electric* decision, although unpublished, appears controlling in the instant proceedings. There is certainly no good reason to distinguish, for *Younger* purposes, a preemption claim from other, equally important, constitutional concerns. Especially, as here, where Federal Express fully litigated the preemption issue before the Commission without questioning at any time the agency's competence or authority to issue a binding decision on that question[13] and where Federal Express similarly

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[13] In Tennessee, administrative agencies have the authority to consider constitutional questions in making determinations on matters under their

(Footnote 13 continued on next page)

raised its preemption claims before the Tennessee Court of Appeals but dismissed the appeal simply because the Court refused to grant a stay, the plaintiff should not be heard to argue that the state agency or the state courts are not fully competent to rule on the preemption issue.[14]

There is no satisfactory explanation to harmonize the inconsistent holdings of the various courts of appeal. Perhaps one could say, as the panel did in *Baggett*, that federal courts should abstain except where preemption "is readily apparent."

A somewhat better approach is suggested by the Second Circuit's recent decision in *Christ the King Regional High School v. Culvert*, 815 F.2d 219, 223 n.4 (1987) a case involving federal preemption under the National Labor Relations Act. That circuit held that abstention "is not usually applied in a preemption case" but explained in *Christ the King* that "the underlying rationale of this doctrine is that it would be futile to abstain in deference to a state decisional body if it should later develop that it may not have jurisdiction over a dispute due to the preemptive jurisdiction of a federal body" such as the National Labor Relations Board. After finding that the state labor relations board had not been preempted by the NLRB, the Court went on to hold that *Younger* required the district court to abstain from adjudicating plaintiff's constitutional claims which were then pending before

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(Footenote 13 continuted)

jurisdiction. *Crawford v. Consolidated Retirement System*, 732 S. W. 2d 293, 297 (Tenn. App. 1987) *cert. denied* by Supreme Court on June 22, 1987. See *Ohio Civil Rights commission, supra*, 91 L.Ed. 2d at 523 (noting that "it would seem unusual doctrine . . . to say that the Commission could not construe its own statutory mandate in light of federal constitutional principles.")

[14] The factual situation here distinguishes this case from *Baggett, supra*, and *Kentucky West Virginia, supra*, in which the federal plaintiffs apparently never litigated their preemption claims in any state administrative or judicial forum.

the state agency. In other words, the rule in the Second Circuit is tht[sic] *Younger* abstention is inapplicable only if, as in the area of labor relations or bankruptcy, Congress has declared that federal courts or agencies have exclusive subject matter jurisdiction and the states have no authority to act. That, of course, is not the issue here. As discussed further in the next section, it cannot seriously be doubted that both the state and federal courts have concurrent, subject matter jurisdiction over the preemption and Commerce Clause issues not before this Court.[15]

II. *Res Judicata*

Purolator Courier, an intervening defendant in this case, has filed an extensive brief on the *res judicata* effect on the Commission's judgment. Counsel for the Commission supports Purolator's arguments and will not repeat them here. Suffice it to say that it is well settled that "this court must afford the same *res judicata* effect to that judgment as would the Tennessee courts." *Whitfield v. City of Knoxville*, 756 F. 2d 455 (6th Cir. 1985); *Tucker v. Callahan*, 663 F. Supp. 375 (M.D. Tenn. 1987). It is equally clear that under Tennessee law, the principles of *res judicata* apply to a final decision of a state administrative agency (*Fourakre v. Perry*, 667 S.W. 2d 483 (Tenn. App. 1983) *cert. denied* on March 19, 1984) and that a state agency has the authority "to consider a constitutional question in making determinations of matters committed to it by law."[16] *Crawford v. Consolidated Retirement System, supra*, 732 S.W. 2d at 297. That an unappealed agency decision on an issue of federal or constitutional law may bind the parties in a subsequent federal court action is hardly a recent or novel legal principle. *Tipler v.*

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[15] It has been established for at least a century that "the state and federal courts have concurrent jurisdiction of suits of a civil nature arising under the Constitution and laws of the United States, save in exceptional circumstances where the jurisdiction has been restricted by Congress to the federal courts." *Grubb v. Public Service Commission*, 281 U.S. 470, 74 L.Ed. 972, 978 (1930).

E.I. DuPont, 443 F. 2d 125, 128 (6th Cir. 1971), ("It is now accepted that both *res judicata* and collateral estoppel can be applicable to decisions of administrative agencies acting in a judicial capacity."); *Mumford Cove Association v. Town of Groton*, 786 F. 2d 530, 535 (2nd Cir. 1986), (holding that the state agency's unappealed decision on an issue of federal law was *res judicata* and that the federal plaintiffs could not "bootstrap" themselves into court by failing to seek state court review and then "be allowed to argue that the Administrative Order is subject to challenge in federal court when such an attack otherwise has been precluded.") Davis, *Administrative Law Treatise*, Vol. 4 § 21:2 and § 21:3 (1983); Wright and Miller, *Federal Practice and Procedure*, Vol. 18, § 4475 (1981).

To escape the preclusive effect of the Commission's final order, Federal Express makes the remarkable argument that neither the Commission nor the Tennessee courts have subject matter jurisdiction to decide whether or not Federal Express is subject to state regulation and therefore any state ruling on that

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[16] The Tennessee Commission has jurisdiction under state law to enforce and interpret the state's motor carrier act (T.C.A. § 65-15-101, *et seq.*); and, as in the case at bar, the agency occasionally must apply the Act in light of federal statutory and constitutional principles. See n.19, *infra.*, and n.13 *supra.*

Thus, this case differs from the situation in *University of Tennessee v. Elliott*, 478 U.S. __, 106 S.Ct. __, 92 L.Ed. 635 (1986) in which the state administrative law judge made factual findings but "held that he lacked jurisdiction to adjudicate respondent's federal civil rights claims." 92 L.Ed. at 641. See also *Loudermill v. Cleveland Board of Education*, 721 F. 2d 550 (6th Cir. 1983) in which the Court did not give preclusive effect to the unappealed decision of a state agency because, under state law, "the administrative agency clearly lacked the power to grant the procedural due process claim" raised by the federal plaintiff. 721 F. 2d at 559 n.13.

issue is subject to collateral attack in federal court.[17] No authority is cited for this proposition except cases such as *Kalb v. Feurstein*, 84 L.Ed. 376 (1940) and *Capital Service, Inc. v. NLRB*, 98 L.Ed. 887 (1953) which involve those "exceptional circumstances" where Congress has vested exclusive jurisdiction over certain subjects, such as bankruptcy and labor relations, in the federal courts.[18]

That a mere claim of federal preemption vests this court with exclusive subject matter jurisdiction over this lawsuit is preposterous. See *Grubbs v. Public Service Commission*, discussed *supra* at n.15. Tennessee courts routinely issue opinions deciding whether state law has been preempted by a federal statute.[19]

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[17] This argument by Federal Express is undercut by the discussion in the later part of its brief which recognizes that a ruling by a court or administrative agency may have preclusive effect even if the tribunal lacks subject matter jurisdiction. As explained in the *Restatement of Judgments*, § 12 (1983), a ruling on subject matter jurisdiction is considered *res judicata* if the issue was fully litigated in a judicial or quasi judicial forum. The procedures and competence of the Tennessee Commission is discussed in the brief filed by Purolator Courier.

[18] As the Supreme Court explained last year, the holding in *Kalb* "was based on Congress' exclusive right to regulate bankruptcy, which gave it the power to vest jurisdiction over bankruptcy proceedings exclusively in one forum and to withdraw that jurisdiction from all other forums." Decisions interpreting the National Labor Relations Act were also based on the Court's conclusion that Congress "has vested in the National Labor Relations Board the exclusive jurisdiction over the administration of those laws." *International Longshoreman's Association v. Davis*, 476 U.S. __, 90 L.Ed. 2d 389, 402 n.11 (1986); See Wright and Miller, *supra*, §§ 4428 and 4429.

[19] Several cases specifically concerned the jurisdiction of the Tennessee Public Service Commission. See, for example, *Illinois Central Gulf Railroad Company v. Tennessee Public Service Commission*, 736 S.W. 2d 112 (Tenn. App. 1987), *cert denied* by Supreme Court on August 31, 1987 (affirming agency's decision that the P.S.C. was not preempted by the Federal Railroad

(Footnote 19 continued on next page)

Certainly nothing in the Federal Aviation Act indicates that the enforcement and interpretation of its provisions is the exclusive prerogative of the federal courts. See *New York Airlines v. Dukes County*, 623 F. Supp. 1435, 1448-1450 (D.C. Mass. 1985) (holding that the preemption section relied upon by Federal Express, 49 U.S.C. § 1305(a), does not create a federal cause of action).

The Sixth Circuit, moreover, has specifically declared that a claim of federal preemption "is not relevant to the determination of whether the district court had subject matter jurisdiction." *Michigan Savings and Loan League v. Francis*, 683 F. 2d 957, 960 (6th Cir. 1982).[20] In other words, plaintiff's preemption

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(Footnote 19 continued0

Safety Act from regulating track walkways); *Tennessee Public Service Commission v. Nashville Gas Company*, 551 S.W. 2d 315 (Tenn.) *cert. denied*, 54 L.Ed. 2d 191 (1977) (affirming Commission's decision that the agency had not been preempted by the federal Natural Gas Act from regulating the sale of gas by an interstate pipeline to an industrial user in Tennessee); *McCanless v. Southeastern Greyhound Lines, supra*, 162 S.W. 2d 370 (Tenn. 1942)(holding that the Tennessee Public Service Commission was not preempted by the Federal Motor Carrier Act or the federal Commerce Clause from regulating the intrastate aspects of interstate bus transportation).

[20] See also *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 82 L.Ed. 638 (1938). That opinion by Mr. Justice Brandeis involved an interesting factual situation which is the mirror image of the case at bar. A labor union filed a complaint with the National Labor Relations Board concerning the activities of Bethlehem Shipbuilding. Before the matter came to hearing, Bethlehem filed an action in federal district court seeking to enjoin the Board on the grounds that the complaint involved only intrastate activities and was therefore not subject to the Board's jurisdiction. The District Court issued the injunction but the Supreme Court reversed, holding that any such argument about the Board's jurisdiction over intrastate activities must be make[sic] to the Board itself and then, if necessary, to the Circuit Court of Appeals which sits in review of the Board's decisions. Plaintiff's allegation that the Board lacked jurisdiction to hear the complaint did not deprive the agency of its statutory authority to enforce and interpret the National Labor Relations Act.

argument not only falls short of giving this Court exclusive jurisdiction over this suit, it does not, standing alone, give the Court any subject matter jurisdiction at all.[21]

In sum, there is no basis for the argument that this Court has exclusive jurisdiction over this suit or that the Tennessee Commission and state appellate courts have no authority to interpret state law in light of the federal Commerce Clause and the Federal Aviation Act. Certainly Federal Express made no such argument when it litigated this matter before the Commission or when it sought injunctive relief from Tennessee Court of Appeals.

Underlying this claim is the implicit assertion that there is "a universal right to litigate a federal claim in a federal court." *Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 441, 66 L.Ed. 2d 308, 320 (1980). But as the Court went on to explain, such an argument "is hardly a legal basis at all" but reflects rather "a general distrust of the capacity of state courts to render correct decisions on constitutional issues," a notion which the Court has repeated and emphatically rejected. *Id.*

Of course, this case involves a decision not of a state court, but of an administrative agency which, acting in a judicial capacity and in accordance with state procedural rules, carefully considered and rejected the federal constitutional and statutory claims raised by Federal Express. As discussed in the brief filed by Purolator Courier, there is no question but that Federal Express

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[21] That is not to say that this Court lacks jurisdiction over this suit. In *Michigan Savings* the Court of Appeals held that no federal jurisdiction exists where federal preemption is raised as a defense to a "threatened" state action. 683 F.2d at 962. Here, the state action is not threatened; it has already occurred so that the issue is ripe for decision. *Michigan Savings* is applicable here to show that a preemption claim, standing alone, does not grant the federal court subject matter jurisdiction, much less the exclusive right to decide the preemption issue.

fully litigated its claims, first before a state administrative law judge and again before the Commission itself.[22] There is no reason to believe that the agency's decision would not be considered conclusive on the jurisdiction issue in subsequent state proceedings involving the regulation of Federal Express and therefore no reason why this Court should not give the same preclusive effect to the agency's order.

Respectfully submitted,

/s/ Henry Walker
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Tennessee Public Service Commission
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615/741-3191

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[22] "We have no hesitation in concluding that this panoply of procedures complemented by administrative as well as judicial review, is sufficient under the Due Process Clause" for the purpose of giving *res judicata* effect to a state agency's decision which was subsequently affirmed by the state court on appeal. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 102 S.Ct. 1883, 72 L.Ed.2d 262, 282 (1982).

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing brief has been forwarded to Alfred H. Knight and Marian F. Harrison, Willis & Knight, 215 Second Avenue, North, Nashville, Tennessee 37201; Val Sanford, Gullett, Sanford, Robinson & Martin, on behalf of Purolator Courier Service Corporation, Intervenor, Metropolitan Federal Building, Third Floor, 430 Fourth Avenue, North, Nashville, Tennessee 37219-0757 on this 12th day of November, 1987.

/s/ Henry Walker
Attorney for Defendants

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 85-5129

AMERICAN ELECTRIC POWER COMPANY, INC.; KENTUCKY POWER COMPANY; APPALACHIAN POWER COMPANY COLUMBUS AND SOUTHERN OHIO ELECTRIC COMPANY; INDIANA AND MICHIGAN ELECTRIC COMPANY; OHIO POWER COMPANY AND AEP GENERATING COMPANY,

Plaintiffs-Appellants,

v.

KENTUCKY PUBLIC SERVICE COMMISSION; RICHARD D. HEMAN, CHAIRMAN OF THE KY PUBLIC SERVICE COMMISSION; LAURA MURRELL, MEMBER OF THE KY PUBLIC COMMISSION; AND RUSH DOZIER, MEMBER OF THE KY PUBLIC SERVICE COMMISSION,

Defendants-Appellees,

AIR PRODUCTS AND CHEMICALS, INC., ARMCO, INC., ET AL, ATTORNEY GENERAL OF KENTUCKY, CONSUMER PROTECTION DIVISION, CONCERNED CITIZENS OF MARTIN COUNTY, INC., JOHN HENRY WARD, BERT DIAMOND AND SALLY CRUM,

Intervenors-Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF KENTUCKY

(Filed: March 24, 1986)

BEFORE: JONES and CONTIE, Circuit Judges; and DEMASCIO, District Judge.*

Per Curiam. This case raises the question whether it is proper for a federal court to dismiss on abstention grounds a challenge to a state public utility commission rate order brought by a utility alleging federal law claims, when the utility has simultaneously brought an attack on the same order raising the same claims in state court. The court below elected to dismiss citing both the *Younger* and *Buford* abstention doctrines. *See Younger v. Harris*, 401 U.S. 37 (1971), and *Burford v. Sun Oil*, 319 U.S. 315 (1943). We hold that *Burford* abstention is inappropriate in this circumstance but that *Younger* abstention is permissible and, accordingly, affirm.

I.

The primary controversy raised in the complaint involves the source from which an electric company will be permitted to purchase wholesale electricity and pass along the cost of that purchase to its customers through retail rates.[1] Plaintiffs-appellants are American Electric Power Company, Inc. ("AEP"), a multi-state holding company of electric power utilities, and its subsidiaries. Kentucky Power Company ("KPC"), one of AEP's subsidiaries, provides electricity to retail customers in Kentucky. KPC is party to an Interconnection Agreement among AEP affiliates. This agreement creates a pool of electricity and permits an Agreement member to draw from this pool when its own power needs exceed capacity. KPC had, for some time, been drawing heavily from this pool. According to KPC, it was therefore obliged by the Interconnection Agreement to find a new source of wholesale electricity. Consequently, in 1984, KPC entered into a second agreement (the "Unit Power Agree-

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* Honorable Robert E. DeMascio, United States District Judge for the Eastern District of Michigan, sitting by designation.

ment) with two AEP subsidiaries under which KPC was permitted to purchase 15% of the output from a new generating plant being built in Rockport, Indiana.[1]

Since the Unit Power Agreement was interstate in nature it was submitted to the Federal Energy Regulatory Commission (FERC) which accepted it as a rate schedule. FERC is empowered by the Federal Power Act, 16 U.S.C. § 791 *et. seq.* (1982), to determine the justness and reasonableness of interstate power transmission rates between utilities. The Unit Power Agreement was also submitted to the Kentucky Public Service Commission, the body which reviews Kentucky intrastate electric rates. The Kentucky Commission construed the Interconnection Agreement as permitting KPC to obtain all of its power needs from the pool without resort to the Unit Power Agreement. Since power under the new agreement would cost KPC more that three times that from the pool, the Kentucky Commission ruled that the purchases from the Unit Power Agreement would be imprudent and refused to approve the retail rate increase needed to pass on the higher costs.

In reviewing the fairness of intrastate retail rates, a state commission is bound to accept a FERC determination of the reasonableness of wholesale source rates. *Narragansett Electric Co. v. Burke,* 381 A.2d 1358 (R,I, 1977), *cert. denied,* 435 U.S. 972 (1978). AEP and KPC argue that by not approving the higher retail rates the Kentucky Commission has illegally displaced or ignored the FERC approved Unit Power AGreement in violation of the Federal Power Act and the Supremacy Clause. Further, they claim that the Kentucky Commission was not

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[1] AEP raised an additional claim in its complaint which involves reimbursements from AEP subsidiaries to KPC for the cost of construction and maintenance of a extra-high voltage line. The substance of this claim is unclear from the record and, regardless, its discussion would add nothing to the resolution of the issues on appeal.

permitted to construe the Interconnection Agreement because the regulation of interstate transmission is preempted by the Federal Power Act and the agreement, therefore, is subject to the sole jurisdiction of FERC. These are the claims the AEP and KPC had raised in federal court. Shortly after filing this complaint, KPC brought an action in Kentucky state court in which it appealed the Kentucky Commission's order and raised the same issues presented here. That action is still pending. When the federal court below elected to abstain in favor of the state action and dismissed the case, the plaintiffs appealed.

II.

Abstention from the exercise of legitimate federal jurisdiction should be the exception, not the rule. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813 (1976); *Ada-Cascade Watch Co. v. Cascade Resource Recovery, Inc.*, 720 F.2d 897, 901 (6th Cir. 1983). "Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest." *Colorado River*, 424 U.S. at 813 (*quoting County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-189 (1959)). It is upon this background that we consider whether abstention was proper in this case. Our review of the trial court's decision to abstain is *de novo*. *Traughber v. Beauchane*, 760 F.2d 673, 676 (6th Cir. 1985).

A.

AEP argues that the court's reliance on *Burford* abstention in dismissing this case was inappropriate. We agree. Abstention was called for in *Burford v. Sun Oil*, 319 U.S. 315 (1943), because the federal court had been asked to review the reasonableness of a Texas Railroad Commission order, a question of state law which implicated the state's ability to develop a comprehensive policy regarding the placement of oil wells. Id. at 320-

22; *Colorado River*, 424 U.S. at 814-15. The need for consistent and informed decisions in this area was evidenced by the state's assignment of the review of these decisions to one state court. *Burford*, 315 U.S. at 325. Under these circumstances, review of the state law question by the federal court risked upsetting the delicate balance among oil producers that the state was attempting to establish in the harvesting of its oil deposits. *See id.* at 327.

Similarly, in *Ada-Cascade*, this court employed *Burford* abstention when it had been asked to determine "whether [a proposed waste] facility had obtained all the necessary state and local permits" to continue construction, an issue which required the interpretation of state acts and rules established as part of a complex system of environmental regulation. 720 F.2d at 901, 905.

By contrast, the court here is not asked to review the validity under state law of the Kentucky Commission order. Nor is the court asked to decide local issues. Rather, AEP claims that the Commission is prohibited from making the order as a matter of federal law. Although we recognize the presence here of a regulatory scheme with consolidated state review, a decision on the grounds raised here will not present the same risk of disruption that was present in *Burford*.

The court below relied primarily upon the Fourth Circuit decision in *Aluminum Co. of America v. Utilities Commission of North Carolina*, 713 F.2d 1024 (4th Cir. 1983), where the court of appeals applied *Burford* to abstain from deciding Alcoa's claim that a commission order interfered with a preemptive federal regulatory scheme and burdened interstate commerce. *Id.* at 1025. Despite the similarity to this case, we decline to follow the *Alcoa* decision. The court there failed to recognize that *Burford* operates only to prevent federal determination of *state* law. Rather, the court abstained because the claim attacked a state order and the determination of the federal issue raised

would cause "needless obstruction of North Carolina's domestic policy." *Id.* at 1029. This is an overly broad application of the doctrine. The Supreme Court has refused to employ *Burford* in a similar context noting that "there is, of course, no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of state policy." *Zablocki v. Redhail*, 434 U.S. 374, 379-80 n.5 (1978).

We hold that *Burford* abstention was improperly applied to this action where no questions of state law that implicate a complex state policy scheme are present.

B.

The doctrine developed in *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny espouses "a strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances." *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982). Abstention under *Younger* can be appropriate in civil cases where the state is a party as well as criminal cases when an ongoing state judicial proceeding implicates important state interests and provides an adequate opportunity to raise constitutional challenges. Id. at 432. When this is the case, the federal court should, absent bad faith, harassment or a patently invalid state statute, defer to certain state proceedings to consider the federal claims in the first instance. *See Colorado River*, 424 U.S. at 816.

There is little question here that the regulation of consumer electric rates is an important state interest or that KPC could raise its constitutional challenges to the Commission order in its state action. However, applying *Younger* here would be unusual in that the federal plaintiff is also, procedurally, a plaintiff in the pending state action. The typical *Younger* case involves a defendant to state initiated proceedings who prefers to raise his federal claims as a plaintiff in federal court than as a defense to

the state court action. *Crawley v. Hamilton County Commissioners*, 744 F.2d 28, 30 (6th Cir. 1984). In *Crawley* state prisoners brought actions to challenge the conditions of their confinement in both state and federal court. This court refused to apply *Younger* abstention precisely because the federal plaintiffs were also the state plaintiffs. Id.

Formal denominations of plaintiff and defendant should not be applied mechanically, however. In *Blue Cross & Blue Shield of Michigan v. Baerwaldt*, 726 F.2d 296, 299 (6th Cir. 1984), this court abstained under *Younger* where an insurance company raised constitutional challenges to a rate order both by bringing an action in federal court and by seeking review of the order in state court. The posture of *Blue Cross* was significantly different than that in *Crawley*. The state proceedings in *Crawley* began with a state court complaint filed by the federal plaintiff. In *Blue Cross*, and in this case, the proceedings began at the regulatory level and the subsequent court action was no more than an appeal of a state order entered against the party who appeals. *See Blue Cross*, 726 F.2d at 299. The process here was begun by the state in asserting its power to regulate intrastate commerce. When the regulatory activities of the state proceed to a state judicial forum, the principles of comity and federalism that underlie the *Younger* doctrine come into play and the federal courts should abstain from interfering.

AEP does not deny that they will have an adequate opportunity to raise their federal claims in the pending state action, nor do they claim that the Kentucky Commission's orders are the result of bad faith or harassment. *See Middlesex County*, 457 U.S. at 437. Consequently we hold that the district court properly dismissed the complaint. The judgment of the court below is AFFIRMED.

CONTIE, Circuit Judge, concurring. I concur in the result and in the reasoning of the Court except for the holding that the district court improperly relied on *Burford* abstention in dismissing this case. I would hold that *Burford* abstention applies.

In *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), the Supreme Court held that a district court should have abstained when presented with a suit seeking review of the reasonableness under Texas state law of a state commission's permit to drill oil wells. Abstention was appropriate because "review of reasonableness by the federal courts . . . where the State had established its own elaborate review system for dealing with the geological complexities of oil and gas fields, would have had an impermissibly disruptive effect on state policy for the management of those fields." *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 815 (1976). Accordingly, even though review of a state law question was at issue in *Burford*, the Court focused on the disruption of a state policy in applying abstention.

This Court addressed and applied Burford abstention in *Ada-Cascade Watch Co. v. Cascade Resource Recovery*, 720 F.2d 897 (6th Cir. 1983), where we found that the Supreme Court had established two factors which justify *Burford* abstention. "First, the presence of a complex state regulatory scheme which would be disrupted by federal court review; and secondly, the existence of a state-created forum with specialized competence in the particular area." *Id.* at 903.

The district court below found that the considerations highlighted in Ada-Cascade existed in the present case. The court initially observed that the first factor was satisfied since Kentucky "has an overriding interest in regulating the retail rates charged by public utilities." The court explained that the fixing of intrastate electricity rates by the Kentucky Commission undoubtedly involved fundamental state policy considerations. Also, the court noted that the rates are set by the Kentucky

Commission "in accordance with statutory procedures enacted for their formulation and execution." The court further found that the second consideration was present since the orders of the Kentucky Commission are appealed to a "designated state-created forum with special expertise in the public utility regulation field." Exclusive judicial review is provided in the Franklin County Circuit Court by K.R.S. 278.410(1).[1] Finding the factors listed in *Ada-Cascade* to be present, the district court held that abstention under *Burford* was required.

The district court's holding is consistent with the Fourth Circuit decision in *Aluminum Company of America v. Utilities Commission of North Carolina*, 713 F.2d 1024 (4th Cir. 1983), a case which was relied upon by the district court. The appeal in *Alcoa* involved an action which had been brought in federal court by a utility company and its parent, seeking to enjoin the enforcement of a rate order issued by the state utilities commission which allegedly interfered with the FERC's regulatory scheme. State court proceedings involving, among other issues, the same federal claims raised in the federal action were pending at the time of appeal. The Fourth Circuit held:

> We believe that the present case involves the quintessential *Buford* setting of a complex state regulatory scheme con-

---

[1] The statute provides in pertinent part:

> Any party to a commission proceeding or any utility affected by an order of the Commission may, within twenty (20) days after being served with the order, or within twenty (20) days after its application for rehearing has been denied by failure of the Commission to act, or within twenty (20) days after being served with the final order on rehearing, when a rehearing has been granted, bring an action against the Commission in the Franklin Circuit Court to vacate or set aside the order or determination on the ground that it is unlawful or unreasonable. Notice of the institution of such action shall be given to all parties of record before the Commission.

K.R.S. 278.410(1)(1981).

> cerning important facts of state policies for which impartial and fair administrative determinations subject to expeditious and adequate judicial review are afforded. The usual rule of comity must govern; the district court properly exercised its discretionary power to withhold relief so as to avoid needless obstruction of [the state's] domestic policy.

Id. at 1029.

The present case is factually indistinguishable from *Alcoa*. I would accordingly follow that Court's analysis in this case and find that the present appeal "involves the quintessential *Burford* setting." Also, the conditions stated in *Ada-Cascade* are met in this case. First, there is a complex state regulatory scheme involving important state policies and second, Kentucky has provided a specialized forum to review challenges such as the one presented on appeal. Based on this court's prior discussion of *Burford* abstention and the holding of the *Alcoa* case, I would affirm the district court's application of *Burford* abstention.

DeMASCIO, District Judge, concurring. While I agree that the district court properly dismissed plaintiff's complaint, I reach that conclusion for the opposite reasons suggested in the per curiam opinion. I am convinced that the proper basis for abstention is *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), and not *Younger v. Harris*, 401 U.S. 37 (1971).

In *Crawley v. Hamilton County Commissioner*, 744 F.2d 28 (6th Cir. 1984), this court circumscribed the application of the *Younger* doctrine. There, the district court dismissed, on *Younger* grounds, a § 1983 action brought by a group of jail inmates challenging the conditions of their confinement. The plaintiffs were contemporaneously pursuing a state court action on the same grounds. The circuit reversed, holding the *Younger* doctrine inapplicable in this procedural context:

> *Younger* and its progeny all have a procedural posture which is very different from our case. In the typical *Younger* case, the federal plaintiff is a defendant in ongoing or threatened state court proceedings seeking to enjoin continuation of those state proceedings. Moreover, the basis for the federal relief claimed is generally available to the would-be federal plaintiff as a defense in the state proceedings. In our case, the federal plaintiffs are also *plaintiffs* in the state court action. In addition, the plaintiffs are not attempting to use the federal courts to shield them from state court enforcement efforts. Accordingly, there is no basis for *Younger* abstention in this case.

Id. at 30 (citations omitted).

Noting that the Kentucky Power Company appealed the Kentucky Public Service Commission's December 4, 1984 order in state court, the lower court held that the *Younger* doctrine, made applicable to civil actions by virtue of *Middlesex County Ethics Committee v. Garden State Bar Ass'n.*, 457 U.S. 423 (1982), made federal abstention proper. I disagree. The

procedural posture of this case does not fit the *Younger* mold. Appellants are not attempting to enjoin state court proceedings against them, but rather they are state court plaintiffs. Further, appellants are not defensively asserting federal claims in the state court action. Therefore, the district court should not have abstained on the basis of the *Younger* doctrine and the per curiam opinion improperly affirms on that basis.

But, under the *Burford* doctrine, abstention is appropriate where federal review of a state law question would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern. *See Ada-Cascade Watch Co. v. Cascade Resource Recovery*, 720 F.2d 897, 903 (6th Cir. 1983).

The prerequisites for the application of *Burford* are: (a) the presence of a complex state regulatory scheme that would be disrupted by federal court review and (b) the existence of a state-created forum with specialized competence in the particular area. In *Alcoa v. Utilities Comm'n of N. Carolina*, 713 F.2d 1024 (4th Cir. 1983), the Fourth Circuit, faced with similar facts, concluded that *Burford* abstention was appropriate. The court held that the state commission's ratemaking "involved important and basic consideration of state policy and was accomplished in accordance with the uniform statutory procedures for the formation of that policy." *Id.* at 1029.

In holding the *Burford* abstention appropriate, the district court stated:

> The Commonwealth of Kentucky clearly has an overriding interest in regulating the retail rates charged by public utilities. The Kentucky Public Service Commission orders outline the retail, intrastate rates to be charged to Kentucky electric power consumers. The setting of these rates undoubtedly involve fundamental state policy considerations and are accomplished in accordance with statutory procedures enacted for their formulation and execution. These

> orders are being appealed by Kentucky Power Company to a designated state-created forum with special expertise in the public utility regulation field; to wit, the Frankling[sic] County Circuit Court. Kentucky Power Company has raised both state and federal legal issues in that forum. These federal issues are the same ones the American Electric Power Co. affiliates wish this court to consider.

I agree that abstention on *Burford* grounds is appropriate in this case. The State of Kentucky certainly has a legitimate interest in the regulation of the retail rates of its public utilities. In order to effectively protect that interest the state regulatory commission has the power to scrutinize expenditures and costs that have been imprudently incurred by a utility when other less expensive means are available for the same purpose. Moreover, an extensive state appellate system exists whereby utilities can seek review of the commission's orders. Not only does such a system exist, but appellants are taking advantage of that system while, at the same time, pursuing this action.

The district court's ruling should be affirmed because abstention based on *Burford* was proper.

SUPPLEMENTAL APPENDIX L

APPEAL BY PERMISSION
FROM APPELLATE COURT TO SUPREME COURT:

RE: TIME

JUDGMENT ENTERED ON THIS
DATE: JULY 08, 1988

Application for permission to appeal shall be filed with the Clerk of the Supreme Court WITHIN THIRTY (30) DAYS after the date of entry of the judgment of the Court of Appeals or Court of Criminal Appeals [Rule 11 (b) Tennessee Rules of Appellate Procedure].

STATE BOARD OF EQUALIZATION,
EXECUTIVE BOARD OF THE
TENNESSEE BAPTIST CONVENTION,
CUMBERLAND PRESBYTERIAN CHURCH,
HOLSTON CONFERENCE OF THE
UNITED METHODIST CHURCH, THE TENNESSEE CONFERENCE OF THE CONVENTION OF THE PROTESTANT EPISCOPAL CHURCH, DIOCESE OF WEST TENNESSEE, DIOCESE OF EAST TENNESSEE, NATIONAL BAPTIST CONVENTION, U.S.A., CATHOLIC DIOCESE OF WEST TENNESSEE, CATHOLIC DIOCESE OF MIDDLE TENNESSEE,
DEFENDANTS / APPELLEES

APPEALED FROM THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

HONORABLE C. ALLEN HIGH, CHANCELLOR

OPINION RELEASED JULY 08, 1988

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AFFIRMED

LLOYD TATUM
SPECIAL JUDGE

OPINION

This case involves an attack by the Metropolitan Government of Nashville and Davidson County on the constitutionality of T.C.A. § 67-5-212(a)(1) which allows exemption from property taxation of one parsonage owned by a church or religious institution.

The Metropolitan government filed a petition with the State Board of Equalization relying upon the provisions of T.C.A. § 4-5-223. The petition sought a declaratory order by the State Board of Equalization declaring the aforesaid statutory provisions, exempting one parsonage per church from property tax, to be unconstitutional as in violation of Article II, § 28 of the Tennessee Constitution. The matter was contested by various churches.

An Administrative Law Judge of the State Board of Equalization held that § 67-5-212(a)(1) was unconstitutional to the extent that it required a per se exemption of parsonages. Appeal was taken by the intervening church groups to the Assessment Appeals Commission which reversed the order of the Administrative Law Judge, holding that parsonages were used for religious purposes as defined by Article II, Section 28 of the Tennessee Constitution. The Metropolitan government appealed to the State Board of Equalization where the judgment of the Assessment Appeals Commission was affirmed.

The Metropolitan Government of Nashville and Davidson County filed a petition for review in the Chancery Court of Davidson County pursuant to T.C.A. § 4-5-322. The Bishop of the Roman Catholic Diocese of Memphis and the other defendant churches filed a motion to dismiss. The Chancellor granted the motion to dismiss, holding that the administrative agency did not have jurisdiction to determine the constitutionality of the statute.

The Metropolitan government and the State Board of Equalization appealed to this court. Two issues are presented: (1) whether the Metropolitan Government of Nashville and Davidson County followed the statutory requirements of exhausting administrative remedies in pursuing this issue; and (2) whether administrative agencies have jurisdiction to determine the constitutionality of a statute pursuant to T.C.A. § 4-5-223. After considering the record, several briefs filed by the parties and argument of counsel, we conclude that the judgment of the Chancellor must be affirmed.

We first address the question as to whether the State Board of Equalization had jurisdiction to determine the constitutionality of a State statute. The appellants, Metropolitan Government of Nashville and Davidson County and the State Board of Equalization, insist that the State Board had this authority pursuant to T.C.A. § 4-5-223, which provides, in part, as follows:

> " 4-5-223. Declaratory orders.—(a) Any affected person may petition an agency for a declaratory order as to the *validity* or applicability of a statute, rule, or order within the primary jurisdiction of the agency." (Emphasis supplied)

The appellants argue that the above provision of the Uniform Administrative Procedures Act, authorizing the administrative agency to promulgate a declaratory order as to the "validity" of a statute, bestows upon the agency jurisdiction to determine the constitutionality of a statute. The appellants reason that if a statute is unconstitutional, then it is "invalid."

The general rule is stated in 73 C.J.S., *Public Administrative Law and Procedure*, § 65, at page 536:

> " In general, administrative officers and agencies may not determine constitutional questions. Accordingly, they have no power of authority to consider or question the constitutionality of an act of the legislature, such as their own

> enabling legislation, and may not declare unconstitutional the statutes which they are empowered to administer or enforce."

In 1 Am. Jur. 2d, *Administrative Law*, § 185, at pages 989-90, it is stated, "It is universally recognized that administrative agencies, as such, do not determine constitutional issues."

In *Goodwin v. Metropolitan Board of Health*, 656 S.W.2d 383, 387 (Tenn. App. 1983), the Court Stated:

> "Of course, a non-judicial board has no power or authority to make constitutional rulings."

This statement from the *Goodwin* case, was construed in *Crawford v. Tennessee Consolidated Retirement System*, 732 S.W.2d 293, 297 (Tenn. App. 1987), to mean "that only a court may pronounce a declaratory judgment on the subject of constitutionality of a law, regulation or action."

In the unreported opinion of this court in the case of *Billy R. Draughon v. Joel Plummer, Commissioner of Safety* (filed at Nashville on November 21, 1984), there was under review a proceeding that originated under the Uniform Administrative Procedures Act, wherein Mr. Draughon's driver's license was suspended by a hearing officer of the Department of Safety pursuant to the "implied consent" law. See T.C.A. § 55-10-406. Mr. Draughon filed a petition pursuant to T.C.A. § 4-5-322 seeking a judicial review of this decision by the Chancery Court. The Chancery Court declined to consider constitutional arguments raised by Mr. Draughon in that court because the issues had not been raised before the administrative agency. This court, in holding that it was not necessary or appropriate to raise constitutional issues before the administrative agency in order to preserve them for judicial review, stated:

"In our opinion, the trial court erred by declining to consider the constitutional arguments raised by Mr. Draughon. While we have already found that the Tennessee Rules of Appellate Procedure do not apply to petitions for review filed in the Chancery Court for Davidson County pursuant to Tenn. Code Ann. § 4-5-322, there are two more important reasons why a litigant in a contested case hearing should not be required to raise constitutional issues before the administrative agency in order to be able to raise these issues before the reviewing court.

First, administrative agencies are ill equipped to hear and decide issues concerning the constitutionality of the legislation empowering them to act or of the procedures they have adopted to conduct their business. In these instances, they lack the proper expertise and impartiality to decide these questions. By attempting to do so, they would invade the province of the Judiciary. *LaFever v. Ware*, 211 Tenn. 393, 400, 365 S.W.2d 44, 47 (1963); *Peay v. Nolan*, 157 Tenn. 222, 229, 7 S.W.2d 815, 816 (1928); and *Goodwin v. Metropolitan Board of Health*, 656 S.W.2d 383, 387 (Tenn. App. 1983). See also 73 C.J.S., *Public Administrative Law and Procedure*, §§ 42 & 65 (1983) and 1 Am.Jur.2d *Administrative Law*, § 185 (1962).

Second, the Tennessee Supreme Court has stated that a constitutional question can be raised at any time. *Veach v. State*, 491 S.W.2d 81, 83 (Tenn. 1973). While the Court recently narrowed this holding by ruling that a constitutional attack upon the validity of a statute should not be considered for the first time on appeal unless the statute is obviously unconstitutional, we do not construe this decision to apply to cases involving petitions for review pursuant to Tenn. Code Ann. § 4-5-322.

Lawrence v. Stanford, 655 S.W.2d 927 (Tenn. 1983) dealt with a civil action filed by a woman and her two minor children against a veterinarian who threatened to turn their dog over to an animal shelter as permitted by Tenn. Code Ann. § 63-12-134 if his bill was not paid. The trial court granted a summary judgment in favor of the veterinarian. The mother and children appealed to this Court and for the first time asserted that Tenn. Code Ann. § 63-12-134 was unconstitutional. This Court considered this constitutional question on appeal even though it had not been raised in the trial court. The Tennessee Supreme Court determined that we should not have reached this issue because it had not been raised in the trial court. The Tennessee Supreme Court determined that we should not have reached this issue because it had not been raised in the trial court. *Lawrence v. Stanford*, 655 S.W.2d 927, 929 (Tenn. 1968).

There are significant procedural and substantive differences between petitions to review decisions of administrative agencies filed in the trial court pursuant to Tenn. Code Ann. § 4-5-322 and appeals from decisions of lower courts lodged in the Court of Appeals. For the purpose of this question, however, only one jurisdictional difference need be discussed.

Unlike administrative agencies, trial courts have the jurisdiction to hear and decide constitutional questions. It is this difference that renders the holding in *Lawrence v. Stanford*, 655 S.W.2d 927 (Tenn. 1983) inapplicable in this case. While a litigant's failure to present a constitutional question to a trial court having the jurisdiction to decide it should prevent him from raising the same issue for the first time on appeal, a litigant's failure to call upon an administrative agency to decide a constitutional question should not have the same consequences. To require parties to present constitutional questions to administrative agencies

> who do not have the authority to decide them would be an exercise in futility and would not promote judicial economy.
>
> It was not necessary, or even appropriate, for Mr. Draughon to request the Department of Safety's hearing officer to decide the constitutional issues he asserted later. Thus, we find that Mr. Draughon did not waive his opportunity to challenge the constitutionality of Tennessee's implied consent law of the procedures used by the Department of Safety to enforce it. He raised these issues in a timely manner by including them as part of his petition for review when it was filed in the trial court."

The conclusion that the administrative agencies cannot decide constitutional issues has received wide recognition in the federal courts and the courts of other states, and clearly represents a majority view. *See, e.g., Downen v. Warner*, 481 F.2d 642, 643 (9th Cir. 1973) ("Resolving a claim founded solely upon a constitutional right is singularly suited to a judicial forum and clearly inappropriate to an administrative board."; *United States v. RCA Alaska Communications, Inc.*, 597 F.2d 489, 507 (Alaska 1978) ("Evaluations of constitutionality and other 'pure' issues of law are within the special expertise of the courts rather than the [administrative] agency.");*Carrollwood State Bank v. Lewis*, 362 So.2d 110, 113-14 (Fla. App. 1978) ("administrative process cannot resolve a constitutional attack upon a statute"); *Flint River Mills v. Henry*, 216 S.E.2d 895, 896-97 (Ga. 1975), *appeal dismissed*, 434 U.S. 1-03 (1978) ("an administrative hearing officer or board . . . is powerless to declare the Act unconstitutional"); *City of Joplin v. Industrial Comm'n of Missouri*, 329 S.W.2d 687, 689 (Mo. 1959) ("administrative agencies do not have authority to determine constitutionality of legislation"); *First Bank of Buffalo v. Conrad*, 350 N.W.2d 580, 585 (N.D. 1984) ("To make the system of administrative agencies function the agencies must assume the law to be valid until judicial determination to the contrary has been made."); *Belco Petro-*

leum Corp. v. State Board of Equalization, 587 P.2d 204, 214 (Wyo. 1978) ("We hold that an administrative agency has no power to determine the constitutionality of a statute.").

To hold that the Legislature intended by use of the word "validity" in T.C.A. § 4-5-223 to vest jurisdiction in an administrative agency to determine the constitutionality of statutes, would be to declare that the Legislative Branch of government attempted to empower the Executive Branch to nullify as unconstitutional a Legislative enactment. It was conceded at oral argument that the State Board of Equalization is a part of the Executive Branch of government. If the Legislature, in enacting T.C.A. § 4-5-223 attempted to vest judicial powers upon the Executive Branch, then the constitutional doctrine of separation of powers would be violated. It is axiomatic that the power and responsibility to determine the constitutionality of statutes rests with the Judicial Department of government. See *LaFever v. Ware*, 211 Tenn. 393, 365 S.W.2d 44, 47 (1963); *Williams v. Carr*, 218 Tenn. 564, 404 S.W.2d 522 (1966); *Peay v. Nolin*, 157 Tenn. 222, 7 S.W.2d 815, 816 (1928).

Article II, Section 1, of the Tennessee Constitution divides the government of this state into three distinct departments: Legislative, Executive and Judicial. Article II, Section 2 provides:

> "No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in cases herein directed and permitted."

If possible, courts will construe a statute in a manner which will uphold its constitutionality and will not construe it in a manner which would defeat it. *Marion County Bd. of Com'rs. v. Marion County Election Commission*, 594 S.W.2d 681 (Tenn. 1980); *Mitchell v. Mitchell*, 594 S.W.2d 699 (Tenn. 1980); *State v. Netto*, 486 S.W.2d 729 (Tenn. 1972); *Ellenburg v. State*, 384 S.W.2d 29 (Tenn. 1964). We hold that the word "validity" as

used in T.C.A. § 4-5-223 was not intended to bestow upon administrative agencies the power to determine constitutionality of State statutes.

The other issue presented by the Metropolitan Government was whether it followed the statutory requirements of exhausting its administrative remedies in pursuing this constitutional issue. Apparently, this issue was precipitated by T.C.A. § 4-5-224 of the Uniform Administrative Procedures Act which allows a suit for declaratory judgments to determine "legal validity or applicability of a statute." T.C.A. § 4-5-224(b) provides that a declaratory judgment under the Administrative Procedures Act cannot be pursued in Chancery Court to determine the validity of a statute "unless the complainant has petitioned the agency for a declaratory order and the agency has refused to issue a declaratory order." As above stated in the quote from *Draughon v. Plummer, supra*, trial courts have the jurisdiction to hear and decide constitutional questions. To require parties to present constitutional questions to administrative agencies who do not have the authority to decide them would be an exercise in futility. We hold that it is not necessary or appropriate to exhaust administrative remedies pursuant to Sections 4-5-223 and 4-5-224 of the Uniform Administrative Procedures Act before resorting to the trial courts of this State for adjudication of the constitutionality of a State statute.

The judgment below is affirmed. Costs are adjudged against appellants, Metropolitan Government of Nashville and Davidson County and the State Board of Equalization.

/s/ LLOYD TATUM, SPECIAL JUDGE

CONCUR:

BEN. H. CANTRELL, JUDGE
SAMUEL L. LEWIS, JUDGE

Supreme Court, U.S.
FILED
JUN 14 1991
OFFICE OF THE CLERK

(3)

No. 90-1766

In The

Supreme Court of the United States

October Term, 1990

FEDERAL EXPRESS CORPORATION,

Petitioner,

vs.

TENNESSEE PUBLIC SERVICE COMMISSION, KEITH BISSELL, FRANK COCHRAN, STEPHEN HEWLETT,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the district court properly abstained from enjoining a state agency's decision in a judicial-type proceeding where important state interests are at stake and where, on the day the plaintiff filed suit in federal court, the plaintiff and the state agency were already litigating the same issues in a state-court appeal of the agency's decision.

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No. 90-1766

In The

Supreme Court of the United States

October Term, 1990

FEDERAL EXPRESS CORPORATION,

Petitioner,

vs.

TENNESSEE PUBLIC SERVICE COMMISSION, KEITH BISSELL, FRANK COCHRAN, STEPHEN HEWLETT,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

The respondents urge that the petition for writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered on February 14, 1991, be denied.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, entered on February 14, 1991 (reprinted in the Appendix to the Petition at A-1), is reported at 925 F.2d 962 (6th Cir. 1991). The district court's opinion,

entered on April 23, 1990 (reprinted in the Appendix at A-16), is reported at 738 F. Supp. 1140 (M.D. Tenn. 1990).

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on February 14, 1991. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(a).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 49, § 1305(a)(1). (Reproduced in pertinent part.)

> (1) Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

United States Code, Title 49, § 1302(b). (Reproduced in pertinent part.)

> (b) Factors for all-cargo air service
>
> In addition to the declarations of policy set forth in subsection (a) of this section, the Board, in the exercise and performance of its powers and duties under this chapter with respect to all-cargo air service shall consider the following, among other things, as being in the public interest:

> (1) The encouragement and development of an expedited all-cargo air service system, provided by private enterprise, responsive to (A) the present and future needs of shippers, (B) the commerce of the United States, and (C) the national defense.
>
> (2) The encouragement and development of an integrated transportation system relying upon competitive market forces to determine the extent, variety, quality, and price of such services.
>
> (3) The provision of services without unjust discriminations, undue preferences or advantages, unfair or deceptive practices, or predatory pricing.

Supremacy Clause of the United States Constitution, Article VI, Clause 2.

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, and Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Commerce Clause of the United States Constitution, Article I, § 8, Clause 3 (reproduced in pertinent part).

> The Congress shall have power . . .
>
> To regulate Commerce with foreign Nations, and among the several states, and with Indian Tribes.

STATEMENT OF THE CASE

This lawsuit arises from a decision of the Tennessee Public Service Commission (the Commission) requiring the petitioner, Federal Express Corporation, to apply for a state license to operate in Tennessee as a regulated truck company. The facts and procedural history of this suit are not at issue and are accurately described in the district court's opinion, *Federal Express Corp. v. Tennessee Public Service Commission*, 693 F. Supp. 598, 599-602 (M.D. Tenn. 1980).[1]

In sum, Federal Express – predominantly an air carrier – operates a sizeable intrastate trucking operation. Every day, the company's trucks carry about 500 packages from a Tennessee shipper to a Tennessee receiver. *Id.* at 600. These packages travel wholly by truck; they never leave the ground. State law therefore requires the company to obtain a certificate of convenience and necessity from the Tennessee Public Service Commission to operate as an intrastate motor carrier. Tenn. Code Ann. § 65-15-107. Federal Express already has motor carrier certificates from California, Massachusetts, and the Interstate Commerce Commission.[2]

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[1] Although the Commission does not dispute any of the district court's factual findings, the Commission's own findings, which were made following a judicial-type administrative hearing, are binding on the parties and the Court. *University of Tennessee v. Elliott*, 478 U.S. 788, 799 (1988); *Fourake v. Perry*, 667 S.W.2d 483, 486 (Tenn. App. 1983).

[2] Trial Transcript (September 10, 1987), 17-19.

The only substantive issue in this case is whether federal law, which preempts state regulation "relating to rates, routes, or services of any [federally certified] air carrier,"[3] also overrides Tennessee's regulation of Federal Express's intrastate trucking operations. The only court to reach the merits of this issue has ruled in favor of state regulation. *Federal Express Corp. v. California Public Utilities Commission*, 716 F. Supp. 1299 and 723 F. Supp. 1379 (N.D. Cal. 1989), appeal pending.

These proceedings began on July 2, 1986, when the Commission directed Federal Express to "appear and show cause" why the company should not cease providing intrastate ground transportation services as a common carrier without first obtaining a certificate of convenience and necessity from the Commission. Purolator Courier, a state-regulated carrier which also operates an air-and-ground, express package service in competition with Federal Express, intervened in support of the Commission's position.

Following a two day, trial-type hearing conducted under the Tennessee Uniform Administrative Procedures Act (Tenn. Code Ann. § 4-5-301, *et seq.*), an administrative judge issued a lengthy opinion concluding that the company's intrastate trucking operations were subject to the Commission's jurisdiction. The Commission itself then reviewed the case and, following oral argument and the filing of additional briefs, issued a twenty-five page opinion affirming the administrative judge's decision and

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[3] *See* § 105 of the Airline Deregulation Act of 1978, 49 U.S.C. 1305(a).

analyzing in some detail the various preemption issues raised by Federal Express. *Id.* at 601. *See Show Cause Order Against Federal Express Corporation*, Docket No. SMC-977, Tennessee Public Service Commission, June 9, 1987 (hereafter, the *Show Cause Order*), printed in the Supplemental Appendix to the Petition at page SA-9.

The Commission gave Federal Express thirty days to file an application for intrastate authority, later extending that deadline to August 25, 1987. The Commission did not address what type, if any, of regulatory restrictions might apply to Federal Express,[4] but assured the company that no enforcement action would be taken during the months needed to consider the company's application:

> The Commission recognizes that Federal Express has many existing Tennessee customers which currently use Federal Express to make Tennessee intrastate shipments. Rather than disrupt these existing operations by immediately issuing a cease and desist order, the Commission hereby directs Federal Express to file an application for a certificate of convenience and

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[4] The "Statement of Facts" in the Petition contains some conclusions concerning the impact of state motor carrier regulation on the operations of Federal Express. *See* Petition at 7, n. 3. Such assertions are speculative since the Company is not presently regulated by the Commission and, as their principal witness testified, he had "no idea what they [the Commission] would do." Trial Transcript, 122. He also noted that the Company operates "relatively well" under state motor carrier regulation in Massachusetts (*id.* at 116) and has not had any problems operating as an interstate motor carrier under the jurisdiction of the Interstate Commerce Commission. *Id.* at 116-118.

> necessity within thirty (30) days of the date of this Order. The Commission will not attempt to interfere with Federal Express' Tennessee intrastate service provided solely by motor vehicle pending a decision on Federal Express' application, provided such application is filed within thirty (30) days of the date of this Order and provided Federal Express expeditiously prosecutes its application.

Show Cause Order, at 24.

Federal Express appealed the Commission's decision to the Tennessee Court of Appeals as provided by the Tennessee Uniform Administrative Procedures Act, Tenn. Code Ann. § 4-5-322. Alleging that the Company would be hamstrung by state regulation and that the mere filing of an application for intrastate authority "may moot the substantial issues raised on appeal," Federal Express asked the state court to stay the Commission's order pending judicial review. "Application for Immediate Stay and Immediate Hearing," at 2 (Joint Appendix in Sixth Circuit at 678) (hereinafter JA-___).

Following a hearing, the Tennessee Court of Appeals issued a short order on August 6, 1987, denying the application for a stay. In response to the company's argument that compliance with the agency's order might be construed as a waiver of the company's preemption claims, the Tennessee Court of Appeals explicitly assured Federal Express that "compliance with said order of the Public Service Commission will not prejudice the prosecution of the present proceeding for review of said order." Order Denying Stay (Tenn. Ct. App. August 6, 1987), JA-653.

Federal Express did not appeal the state court's decision. Instead, on the day after the state court's ruling, the

company filed a complaint and application for a stay in the United States District Court for the Middle District of Tennessee. The district court issued a temporary restraining order on August 7, 1987, prohibiting the Commission from enforcing its order. JA-135. Despite the state court's explicit language to the contrary, the court wrote – without explanation – that the "filing of an application may render moot the plaintiff's constitutional and federal statutory claims and unduly interfere with and harm the plaintiff's alleged integrated transportation system." JA-136.

As described in the district court's decision (693 F. Supp. at 601-602), the case was tried on September 10 and 11, 1987. At the outset, Federal Express announced that it had moved to dismiss its state court appeal "apparently hoping to undercut any possibility of abstention."[5] *Id.* at 601. The court then heard testimony from two Federal Express executives and oral argument on the issues of preemption and abstention. Purolator Courier participated in the trial as a co-defendant in support of the Commission but is not a party to this appeal.

On June 16, 1988, the district court issued an opinion dismissing Federal Express's suit on the grounds that the court had no jurisdiction over the company's federal preemption claims. *See Public Service Commission v. Wycoff*, 344 U.S. 237 (1952), and *Michigan Savings and Loan League v. Francis*, 683 F.2d 957 (6th Cir. 1982). The district court also noted that dismissal of the lawsuit "comports

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[5] The Company moved to dismiss its state appeal on September 9, 1987. The Court of Appeals granted the motion on September 11, 1987.

with the deference entitled to state administrative decisions and state court review emphasized in *Wycoff*." *Id.* at 607. Using the language and logic of the *Younger*[6] abstention doctrine, the court continued:

> Essentially, Federal Express is substituting this Court for a carefully devised avenue of appeal through the Tennessee Supreme Court, and the U.S. Supreme Court. . . . For this Court to encourage the maneuver employed by Federal Express in this case would undercut important principles of federalism.

Id.

All parties filed motions asking the district court to reconsider its ruling on subject matter jurisdiction. The district court, however, issued a second order, reaffirming the first, on August 17, 1989. *Id.* at 607-617.

On appeal, Federal Express again challenged the district court's decision on subject matter jurisdiction. The Commission, arguing that the district court had reached "the right decision for the wrong reason," asked the Sixth Circuit to hold that the *Younger* abstention doctrine, not *Wycoff*, required dismissal of the company's federal lawsuit. The Sixth Circuit initially affirmed district court but, upon reconsideration, reversed its ruling on subject matter jurisdiction and remanded the case for consideration of the abstention issue in light of its decision in *CSXT, Inc. v. Pitz*, 883 F.2d 468 (6th Cir. 1989). *See Federal Express v. Tennessee Public Service Commission*, 909 F.2d 1483 (6th Cir. 1989) (Table).

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[6] *Younger v. Harris*, 401 U.S. 37 (1971).

On remand, the parties filed additional briefs and argued orally on the abstention question. In April, 1990, the district court issued an opinion adopting the Sixth Circuit's suggestion that *Younger* and its decision in *CSXT* required dismissal of the company's lawsuit. *Federal Express Corp. v. Tennessee Public Service Commission*, 738 F. Supp. 1140 (M.D. Tenn. 1990). A year later, the Sixth Circuit affirmed. *Federal Express Corp v. Tenn. Public Service Commission*, 925 F.2d 962 (6th Cir. 1991).

SUMMARY OF ARGUMENT

This case represents a straightforward application of the *Younger* abstention doctrine. There is no dispute that this case involves a quasi-judicial decision by a state agency and that the state's interest in motor carrier regulation is sufficient to invoke *Younger*. In its petition to this Court, Federal Express contends that *Younger* is inapplicable because (1) the Commission waived the right to raise the abstention issue; (2) there is no longer a "pending" state proceeding since Federal Express withdrew its state court appeal shortly before the federal trial began; and (3) the carrier's federal preemption argument is facially conclusive.

Each of these arguments is addressed by both the district court and the Sixth Circuit.

1. Once the trial court raised the abstention issue, the Commission argued "vehemently" (district court opinion, A-26) and "persistently" (court of appeals opinion, A-8) that the suit should be dismissed on abstention

grounds. The carrier's waiver argument is based on a misstatement by Commission counsel during oral argument in the trial court; counsel, however, later corrected that statement in his post-trial brief and has argued in favor of abstention since that time. There has never been an express, intentional waiver of the Commission's right to raise the issue.

2. Since *Ex Parte Young*, 209 U.S. 123 (1908), it has been established that the federal courts "cannot, of course, interfere in a case where the proceedings were already pending in a state court." *Id.*, at 166-167. That Federal Express later withdrew its state court appeal is irrelevant. The proper time for determining the applicability of *Younger* is the day "when this [the federal] suit was filed." *Pennzoil v. Texaco*, 481 U.S. 1, 17 (1987).

3. The carrier's federal preemption argument is, to say the least, not "facially conclusive." In fact, the only court to rule on the merits of the preemption issue has ruled against the carrier's position. *Federal Express Corp. v. California Public Utilities Commission*, 716 F.Supp. 1229, 1302-1303 (N.D. Cal. 1989). That decision is now on appeal to the Ninth Circuit.

ARGUMENT

I. THE COMMISSION HAS NOT WAIVED THE ABSTENTION ISSUE.

The district court, the forum best able to analyze the parties' tactics in this case, concluded that the Commission "has not waived the abstention argument" but, "in its papers and through the hearing . . . , continued to raise

the abstention question and vehemently argued" that the district court should dismiss the plaintiff's complaint.[7] A-26. The Sixth Circuit agreed, "Our review of the proceedings in the district court reveals that the Commission did not waive the abstention arguments." A-8.

The district court first raised the abstention issue during a status conference in chambers on August 20, 1987, two weeks after the complaint was filed. A-6. In response to the district court's suggestion, the Commission filed a "Supplement to Trial Brief of Defendants" on September 2, 1987, urging the court to dismiss this suit on abstention grounds. SA-72. Referring to the company's pending suit in state court, the Commission argued (SA-77) that Federal Express "will not be harmed by an order granting judgment on the basis of abstention since it has a pending appeal in the Tennessee Court of Appeals where its rights can be fully adjudicated." Federal Express filed a reply brief on September 8, 1987, arguing primarily that abstention does not apply to federal preemption claims.

On September 10, 1987, the district court heard argument from Federal Express, the Commission, and Purolator Courier on the abstention issue. A-7. At the outset, counsel for Federal Express announced that the company

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[7] The district court's discussion of the waiver issue notes that the Commission "vehemently argued" that the court "did not have subject matter jurisdiction" over the suit. A-26. The district court's reference to "subject matter jurisdiction" is clearly intended to refer to the abstention issue.

had filed a motion to dismiss its state court appeal.[8] Trial Transcript, 2. The parties then argued the abstention question. *Id.* at 2-28.[9] The district court postponed consideration of that question "pending consideration of the merits' of the lawsuit and then proceeded with the trial. *Id.* at 28.

The Court heard testimony on September 10, 1987, and closing arguments on September 11, 1987, during which all three parties again discussed the abstention issue. *Id.* at 207-227. Counsel for the Commission stated that, in light of the decision by Federal Express to dismiss its state court appeal, the abstention question "is no longer an issue in this case." *Id.* at 214. Counsel for Purolator Courier disagreed, however, pointing out that the abstention issue was still before the Court, at least until the Tennessee Court of Appeals ruled on the motion to dismiss. *Id.* at 223, 227. Purolator Courier also requested and received permission to file an amended answer (*id.* at 226) in which it specifically pled the abstention issue.[10]

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[8] During argument on the abstention issue, counsel for Federal Express said, "This Court should not abstain, first of all, because there is no pending State case. We move[d] to dismiss that." Trial Transcript, 11. As the district court noted, the company dismissed its state appeal "apparently hoping the undercut any possibility of abstention." 693 F. Supp. at 601.

[9] Federal Express argued two points. First, the company said abstention did not apply because there was no longer a pending state case. Second, counsel said that abstention should not apply to federal preemption claims. Trial Transcript, 9.

[10] Answer of Purolator Courier Corp., filed September 24, 1987, paragraphs 1 and 25.

The district court then took the entire matter under advisement and "requested additional briefs on the issues of abstention and *res judicata*." 693 F.Supp. at 602. In their post-hearing briefs, Federal Express and Purolator Courier once more urged the district court to dismiss this suit under the abstention doctrine. Counsel for the Commission expressly retracted his statement made during closing argument and wrote that, based on further research, it was clear that the abstention question was still before the Court.[11]

Abstention can be waived, as this Court has explained, because "if the State voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back to the State's own system." *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 479-80 (1977). A state, for example, may voluntarily submit to federal jurisdiction "in order to obtain a more expeditious and final resolution of the merits of the constitutional issue." *Brown v. Hotel Employees*, 468 U.S. 491, 500, n.9 (1984). This Court noted that in each such case there had been an express, intentional waiver of the State's right to raise the abstention issue. *Ohio Civil Rights Commission v. Dayton Christian Schools*, 477 U.S. 619, 626 (1986).

Here, the Commission never waived, expressly or otherwise, its right to argue that this lawsuit should have been resolved in the state courts. Except for the error by Commission counsel during closing argument, a mistake

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[11] Supplemental Brief of the Tennessee Public Service Commission, filed November 12, 1987, p.1. S.A.-127.

he corrected in the Commissioner's post-hearing brief, both defendants repeatedly argued to the district court, before and after the trial, that this case should be dismissed on abstention grounds.[12]

Once the abstention issue had been raised, Federal Express faced a strategic dilemma. The company had to decide whether to pursue its state court appeal – and risk losing the abstention argument – or dismiss its state case in the hope that the abstention issue would disappear.

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[12] Federal Express highlights the fact that the Commission failed to raise the abstention issue in its answer to the complaint. But there is no rule – and none cited by the company – that abstention must be raised in the pleadings. The abstention doctrine can be raised by any party, or by the court, at anytime. *See Sosna v. Iowa*, 419 U.S. 393, 396 (1975) (*Younger* abstention was raised for the first time by the Supreme Court); *CSXT*, 883 F.2d at 471 (*Younger* abstention was first raised in a motion filed by an intervening defendant); and *Louisiana Power and Light v. Thibodaux*, 360 U.S. 25 (1959) (this Court upheld the right of the district court to raise an abstention question, *sua sponte*, and require the parties to seek clarification from the state courts even though no party had requested such action).

Federal Express also points out that the Commission moved for a prompt trial pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure. Nothing in that unopposed motion, which was granted on the same day that the Court raised the abstention issue, had anything to do with *Younger*; nor was it inconsistent for the Commission, having been enjoined from enforcing state law, to urge the Court either to dismiss the suit on abstention grounds or to begin trial as soon as possible.

Federal Express chose the second approach but, as discussed in § III, *infra* at 18, below, the abstention issue has not disappeared.

II. FEDERAL EXPRESS'S PREEMPTION CLAIM IS NOT "FACIALLY CONCLUSIVE."

Alleging that federal preemption of state regulation is "clear cut" and "facially conclusive", Federal Express argues that ordinary abstention principles must give way in these unusual circumstances. Petition for Writ of Certiorari at 15-19. The argument is without merit. Federal Express is apparently trying to bring this case under an exception to the abstention doctrine, recognized in the *Younger* case itself, which provides that federal court intervention is appropriate if the plaintiff demonstrates that the challenged state action is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." *Younger*, 410 U.S. at 53-54. *See New Orleans Public Service Commission v. City Council of New Orleans*, 491 U.S. 350 (1989).

This exception is, to say the least, rarely used. As the Sixth Circuit pointed out in *Zalman*, 802 F.2d at 205, "The Supreme Court has never found it to be applicable since it first announced the exception in *Younger*." Some commentators and courts believe the exception no longer exists. *Id.* at 206; 17A Wright, Miller, and Cooper, *Federal Practice and Procedure*, § 4255 (1988).

The short answer to the company's argument is the district court opinion in *Federal Express Corp. v. California Public Service Commission*, 716 F. Supp. at 1302-1303, which rejects convincingly the very preemption arguments raised by Federal Express in this lawsuit. Whether or not that lower court opinion is affirmed on appeal, it is evident that the company's preemption arguments are not "facially conclusive."

To support its argument, the company cites three cases interpreting, in different contexts, the preemption language of the Airline Deregulation Act, 49 U.S.C. 1305(a)(1). Two cases hold that the Act preempts state regulation regarding the advertising of airline fares.[13] The third case involves a state scheme to impose landing fees.[14] Each case involved laws "relating to rates routes, or services of airlines." *Trans World Airlines v. Mattox*, 879 F.2d at 779.

But as the district court in California pointed out, the preemption language in the Airline Deregulation Act has been found inapplicable in cases involving activities not directly related to airline service. *Federal Express*, 716 F. Supp. at 1302. This determination – whether door-to-door truck deliveries are "related to" the services of an "air carrier" – is, of course, the heart of the whole matter. The

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[13] *Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773 (5th Cir. 1990); and *Illinois Corporate Travel v. American Airlines*, 889 F.2d 751 (7th Cir. 1989).

[14] *New England Legal Foundation v. Mass. Port Auth.*, 883 F.2d 157 (1st Cir. 1989).

California district court "found no cases in which the phrase 'relating to' . . . has been applied to regularly conducted ground transportation." *Id.* at 1303. No one, other than Federal Express, seems to find the company's preemption claim "facially conclusive."

III. STATE PROCEEDINGS WERE "ONGOING" WHEN THIS FEDERAL SUIT WAS FILED.

"The proper time for determining the applicability of *Younger* abstention is the time that the federal complaint is filed." *Zalman v. Armstrong*, 802 F.2d 199, 204 (6th Cir. 1985).[15]

This lawsuit was filed on August 7, 1987. On that day, Federal Express and the Commission were both parties in a state court proceeding filed a month earlier by Federal Express. Although the company later dismissed its state case, it is now settled that, even if the state courts can no longer grant relief, *Younger* applies if state judicial proceedings were pending "when this [federal] suit was

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[15] The "day of filing" rule is as old as the power of the federal courts to issue injunctions against state officials. In *Ex Parte Young*, 209 U.S. 123 (1908), this Court established the principle that a federal court could enjoin state officials from enforcing state law against a regulated carrier in violation of the United States Constitution. Noting that such suits should normally be brought in the state courts, this Court cautioned, "[T]he federal court cannot, of course, interfere in a case where the proceedings were already pending in a state court." *Id.* at 162, 166-167.

filed." *Pennzoil v. Texaco*, 481 U.S. at 17.[16] *See also Huffman v. Pursue*, 420 U.S. 592 (1975).

Federal Express makes two arguments in response. First, the company relies on two abstention cases, *Thomas v. Texas State Board of Medical Examiners*, 807 F.2d 453 (5th Cir. 1987), and *Bacon v. Rutland Railroad Co.*, 232 U.S. 134 (1914), where both plaintiffs were allowed to challenge state administrative actions by filing suit in the federal rather than the state courts. Assuming, however, that *Thomas* and *Bacon* are still good law,[17] neither decision is relevant to the "day-of-filing" rule. The plaintiff in *Bacon*, as this Court pointed out sixty years later, never initiated state judicial proceedings, *Huffman*, 420 U.S. at 609, n.21.

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[16] In that case, Texaco failed to raise its federal claims in the state courts and, by the time the company's federal suit reached this Court, Texaco no longer had any state remedies to pursue. The Court nevertheless ruled that *Younger* required dismissal of the company's federal complaint, explaining that "Texaco cannot escape *Younger* abstention by failing to assert its state remedies in a timely manner." 481 U.S. at 16, n.16. "[W]e cannot say that those [state] courts, *when this suit was filed*, would have been any less inclined than a federal court to address and decide the federal constitutional claims." *Id.* at 17 (emphasis added).

[17] This Court has recently suggested that if the underlying state administrative proceeding is "judicial" in nature, the failure to pursue state court appeals will bar federal relief even if no state proceedings are pending when the federal suit is filed. *New Orleans Public Service Comm. v. New Orleans City Council*, 491 U.S. 350 (1989).

The plaintiff in *Thomas* withdrew his state appeal before filing his federal lawsuit. *Thomas*, 807 F.2d at 456 (explaining that "at the time this suit was filed, no state action was pending"). In neither case was there a state proceeding pending when the plaintiff filed his federal complaint.

The district court's decision, moreover, goes further than the "day-of-filing" rule. Relying on *Pennzoil*, *Huffman*, and *New Orleans*, the district court ruled that *Younger* requires exhaustion of state court remedies and would compel dismissal of this lawsuit even if there had been no state suit pending at the time Federal Express filed its federal complaint. A-19 through A-23.

The district court's analysis is supported by the Eighth Circuit's decision last year in *Alleghany Corp. v. McCartney*, 896 F.2d 1138, (8th Cir. 1990), in which the court dismissed on *Younger* grounds a preemption challenge to the jurisdiction of a state insurance commissioner. There, as here, the federal plaintiff participated unsuccessfully in proceedings before the state agency but, instead of pursuing its state court remedies, filed suit in the United States District Court. The Eighth Circuit reached the same conclusion as the district court in this case about the applicability of *Younger*:

> Alleghany asserts that even if the proceeding was judicial in nature, abstention is nevertheless improper because the proceeding is no longer pending. The Supreme Court's holding in *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), requires that we reject this argument. . . . Since *Huffman*, courts have consistently held that a party cannot avoid *Younger* by choosing not to pursue available state appellate remedies. *See*

Pennzoil Co. v. Texaco, 481 U.S. 1, 16-17 (1987); *Coley v. Clinton*, 635 F.2d 1364, 1371 (8th Cir. 1980).

NOPSI faced the question of the applicability of the exhaustion requirement to completed administrative proceedings, but assumed that the exhaustion requirement would apply to both continuing and final administrative proceedings.[1] The Court noted that *Dayton Christian Schools* suggests that "an administrative proceeding to which *Younger* applies cannot be challenged in federal court even after the administrative action has become final." *NOPSI*, 109 S.Ct. at 2518, n.4.

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[1] The concurring opinion of Chief Justice Rehnquist underscores this principle by stating that nothing in the Court's opinion "alter[s] our prior case law indicating that such proceedings [administrative proceedings which are judicial in nature] should be regarded as 'ongoing' for the purposes of *Younger* abstention until state appellate review is completed." *NOPSI*, 109 S.Ct. at 2521 (Rehnquist, C.J., concurring). Also, the concurring opinion of Justice Blackmun indicates that he believes that a completed administrative proceeding constitutes an ongoing proceeding for *Younger* purposes. *See id.* (Blackmun, J., concurring).

Alleghany Corp. v. McCartney, 896 F.2d at 1144.

The Eighth Circuit's reasoning is convincing. It makes no sense to apply *Younger* to state administrative proceedings that are still pending – as in *CSXT* – but not to require the losing party to exhaust his state appellate remedies. The case of abstention is even stronger here where Federal Express, unlike Alleghany, went to state

court, argued unsuccessfully for a stay, and then filed a federal suit while the state appeal was still pending.

CONCLUSION

The decisions by the district court and the Sixth Circuit are based on the straightforward application of *Younger* principles and are consistent with recent interpretations of *Younger* from this Court and from other federal appellate courts. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 90-1766

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

FEDERAL EXPRESS CORPORATION,
Petitioner,

vs.

TENNESSEE PUBLIC SERVICE COMMISSION, KEITH BISSELL, FRANK COCHRAN, and STEVEN HEWLETT,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF AND SUPPLEMENTAL APPENDIX OF PETITIONER

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REPLY BRIEF

The parties have fully outlined their respective positions concerning the Sixth Circuit's decision to abstain, and full argument on the merits of the questions presented is properly reserved for briefing on the merits. However, since Federal Express' petition for certiorari was filed, the Ninth Circuit Court of Appeals has reversed *Federal Express v. California Public Utilities Commission*, 716 F. Supp. 1299 and 723 F. Supp. 1379 (N.D. Cal. 1989), upon which the Public Service Commission relies to argue that this Court need not consider whether 49 U.S.C. App. § 1305 so clearly preempts Tennessee's economic regulation of Federal Express as to preclude abstention. In the

Public Service Commission's words, the "short answer to the company's argument [that 49 U.S.C. App. § 1305 so clearly preempts the Public Service Commission's regulation of Federal Express that abstention is inappropriate] is the district court's opinion in *Federal Express v. California Public Utilities Commission*, 716 F. Supp. at 1302-1303 (N.D. Cal. 1989) which rejects convincingly the very preemption arguments raised by Federal Express in this lawsuit." Reply brief of the Tennessee Public Service Commission, page 17.

On June 25, 1991, this opinion of the California District Court was overturned in a brief opinion by the Ninth Circuit Court of Appeals, which sets forth the plain meaning of 49 U.S.C. § 1305. The "short answer" now in the Ninth Circuit is that preemption under 49 U.S.C. App. § 1305 is clear. Therefore, the Sixth Circuit's opinion in this case clearly conflicts with opinions from other circuits holding that abstention is inappropriate in clear-cut federal preemption cases. *Champion International Corporation v. Brown*, 731 F.2d 1406 (9th Cir. 1984); *Baggett v. Department of Professional Regulation*, 717 F.2d 521 (11th Cir. 1983). *See New Orleans Public Service Commission v. City Council of New Orleans*, 491 U.S. 350 (1989), *Public Utilities Commission v. Ohio United Fuel Gas Company*, 317 U.S. 456 (1943). (*See* discussion in Petition for Certiorari, pp. 15-19).

A copy of the Ninth Circuit's recent opinion in *Federal Express v. California Public Utilities Commission* is submitted herewith as the Supplemental Appendix A. The substantive issue in the California case is precisely the same as the issue here. The Ninth Circuit held that the Public Utilities Commission's economic regulation of Federal Express was clearly prohibited by 49 U.S.C. App. § 1305, even though some trucks in Federal Express' integral trucking operations transport intrastate parcels alongside interstate parcels. The Court stated:

"Our reading of the *plain words* of the statute is confirmed by consideration of the purposes of the Airline Deregulation Act and the Federal Aviation Act of 1958. The aim of federal preemption is to prohibit a state 'from enacting any law, establishing any standard determining routes schedules, or rates, fares, or charges in tariffs of, or otherwise promulgating economic regulations, for any air carrier certified by the Board . . . .' The Federal Aviation Act of 1958 confided to federal authority the 'promotion of adequate, economical, and efficient service by air carriers at reasonable charges, ...' Amending the 1958 Act in 1979, Congress specifically required 'a sound regulatory environment' where decisions, 'reached promptly' 'facilitate adaptation of the air transportation system to the present and future needs of the domestic and foreign commerce of the United States . . . .' In particular, in 1977, Congress sought the 'encouragement and development of an expedited all-cargo air service system,' 49 U.S.C. App. § 1302(b)(1), and Congress sought under the same hearing, 'Factors for all-cargo air service,' the 'encouragement and development of an integrated transportation system,' 49 U.S.C. App. § 1302(b)(2).

Federal Express is exactly the kind of an expedited all-cargo service that Congress specified and the kind of integrated transportation system that was federally desired. Because it is an integrated system, it is a hybrid, an air carrier employing trucks. Those trucks do not destroy its status as an air carrier. They are an essential part of the all-cargo air service that Federal Express innovatively developed to meet the demands of an increasingly interlinked nation. Congress has freed it from the constrictive grasp of economic regulation by the states." (Emphasis supplied). *Federal Express v. California Public Utilities Commission*, No. 89-16444 (9th Cir., June 25, 1991) (Supplemental Appendix, pp. SA-8 - SA-9).

Thus, the Ninth Circuit has held that the implications of 49 U.S.C. App. § 1305 are clear and convincing. That is, state economic regulation of Federal Express, the type of regulation that the Tennessee Public Service Commission is attempting to impose, is clearly prohibited. This case therefore cries for examination of the important question whether Federal courts can abstain when Congress has clearly and unequivocally stated that states and their agencies may not act. Federal Express respectfully submits that certiorari should be granted in this case to consider this issue and others raised in its petition for certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response has been mailed this 25th day of July, 1991, to the following counsel:

Henry M. Walker, Esq., General Counsel
Tennessee Public Service Commission
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/s/ Marian F. Harrison

SUPPLEMENTAL APPENDIX

SUPPLEMENTAL APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 89-16444

D.C. No. CV-87-4891-MHP

OPINION

Federal Express Corporation,
Plaintiff-Appellant,

v.

California Public Utilities Commission; Stanley Hulett; Donald Vial; Frederick R. Duda; John B. Ohanian; G. Michael Wilk; Victor Weiser; Norman Kelley,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California
Marilyn H. Patel, District Judge, Presiding

Argued and Submitted
March 14, 1991 — San Francisco, California

Filed June 25, 1991

Before: Robert R. Beezer and John T. Noonan, Jr., Circuit Judges, and James K. Singleton*, District Judge.

Opinion by Judge Noonan

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* The Honorable James K. Singleton, United States District Judge for the District of Alaska, sitting by designation.

SUMMARY

Jurisdiction

Reversing and remanding a district court grant of summary judgment with instructions to grant the injunctive relief requested, the court of appeals held that regulation by California of an air carrier employing trucks as part of its essential all-cargo air service was preempted by the Airline Deregulation Act.

Appellant Federal Express Corporation brought suit against the California Public Utilities Commission (PUC), seeking a declaration that PUC regulation of trucks used as part of its all-cargo air service imposed an unconstitutional burden on interstate commerce and were preempted by the Airline Deregulation Act. Federal Express sought an injunction against the PUC enforcement of these regulations against it. The district court granted judgment for the PUC.

[1] Federal Express appealed both on the grounds that the state regulation excessively burdened interstate commerce and that state regulation is preempted by act of Congress. However, the court did not consider the first ground as it found that statutory preemption existed. [2] The court found that Federal Express was an air carrier having authority under federal law to provide air transportation. [3] Interpreted in terms of its purpose and in the context of other laws, the Airline Deregulation Act as it applied in this case preempted action by the state that regulates the rates and terms of service offered by an air carrier.

[4] The trucking operations of Federal Express were integral to its operation as an air carrier. The trucking operations were not some separate business venture; they were part and parcel of the air delivery system. [5] The PUC's regulation of rates, discounts and promotional pricing, overcharges, bills of lading and freight bills, and its imposition of fees entered the zone that Congress has forbidden the states to enter. Its regulatory scheme went far

beyond safety on highways. [6] Federal Express was exactly the kind of an expedited all-cargo service that Congress specified and the kind of integrated transportation system that was federally desired. Federal Express' use of trucks did not destroy its status as an air carrier. Accordingly, it was freed from the constrictive grasp of economic regulation by the states.

COUNSEL

Eliot S. Jubelirer, Morgenstein & Jubelirer, San Francisco, California, for the plaintiff-appellant.

James T. Quinn, California Public Utilities Commission, San Francisco, California, for the defendants-appellees.

OPINION

NOONAN, Circuit Judge:

Federal Express Corporation (Federal Express) brought suit against the California Public Utilities Commission and individual named defendants (the PUC), seeking a declaration that regulations of the PUC, as applied to Federal Express, impose an unconstitutional burden on interstate commerce and are preempted by the Airline Deregulation Act, 49 U.S.C. App. § 1305, and an injunction against the PUC enforcing them against Federal Express. On cross-motions for summary judgment, the district court found no preemption and no unconstitutional burden and entered judgment for the PUC. We now reverse the district court and direct that judgment be entered for Federal Express.

FACTS

The following facts are undisputed:

Federal Express is an air carrier operating under the authority of the Civil Aeronautics Board as provided in subchapter IV of

the Federal Aviation Act of 1958, 49 U.S.C. § 1371. The carrier operates sixty Boeing 727 aircraft, twenty-one DC-10 aircraft, and more than one hundred specifically designed Cessna-208 aircraft. In planes operated, Federal Express is one of the largest airlines in the United States.

Federal Express is an "all-cargo" carrier, that is, it carries no passengers. It carries packages. The packages are picked up by van in the communities serviced, trucked to an airport, flown to a "hub" where they are sorted, put on other aircraft to their destinations, and trucked by van to their recipients. Federal Express' main hub is Memphis. Between midnight and two o'clock each morning over 700,000 packages are delivered, sorted, and re-routed at the Memphis facility.

Oakland, California is a regional hub in this system. Packages destined for ten western states are transported here, sorted, and sent on to their destinations. Over 200,000 packages each week are transported that have both their origin and destination in California. Packages collected at Oakland and bound for Los Angeles may be shipped there in three different ways: (1) to Memphis, back to Los Angeles; (2) directly to Los Angeles by air; (3) by truck from Oakland to Los Angeles. The trucks carry the packages in specially designed "aircraft containers." In the evening a single truck runs from Oakland to Los Angeles, and two trucks go from Los Angeles to Oakland carrying packages that do not fit on board the Oakland-bound night flight. In the morning one truck goes from Oakland to Los Angeles and one from Los Angeles to Oakland carrying second day packages that do not make the evening flight. Most of the packages in any truck are packages in interstate commerce; some carry exclusively interstate packages.

Federal Express guarantees delivery by 10:30 a.m. the day after a package has been picked up. There is a full refund if a package is even one minute late. To keep this schedule, even the

most minor delays must be avoided, and Federal Express must be prepared to meet changing weather, mechanical breakdowns, and varying conditions at airports. As the system operates as an integrated whole, a delay of even one half-hour at an airport may affect thousands of packages at the Memphis sorting point. The system would not achieve its goal of certain, speedy service without backup equipment and alternative modes of transportation. In particular, as far as Federal Express's California operations are concerned, the choice of one of the three modes of transportation from Oakland to Los Angeles depends on air traffic, control delays, weather, aircraft availability, and the volume of packages in the entire system.

As trucks are an essential component of the system, Federal Express operates over 2,600 trucks in California. The trucks are licensed to use the highways by the PUC. Up until early 1987 Federal Express also paid a quarterly fee assessed by the PUC on its estimated gross operating revenue under Cal. Pub. Util. Code § 5003.1.

The PUC is an agency of the state of California with authority to regulate common carriers on the highways of California. California Constitution, Art. XII; § 4, Cal. Pub. Util. Code §§ 1063 and 3501 et seq. (West 1975 & Supp. 1991). Under the statutory authority conferred by Public Utility Code §§ 486-496 the PUC has issued orders governing the tariffs of common carriers, General Order 80-C, February 7, 1990; for the suspension of the tariffs, General Order 113-B, July 2, 1980; and for their public inspection, General Order 139. September 1, 1976. The PUC regulates the terms of the bills of lading, the freight bills and "accessorial services" documents issued by the carriers, General Order 135, March 1, 1987. The PUC provides a procedure by which carriers may obtain variances from its orders. The PUC has represented to the court that its regulatory program is "flexible" and "adaptive."

PROCEEDINGS

On September 23, 1987 Federal Express brought this action in the district court with the results stated above. Federal Express appeals.

ANALYSIS

[1] Federal Express appeals both on the ground that the state regulation excessively burdens interstate commerce and on the ground that state regulation is preempted by act of Congress. We need not and do not consider the first ground as we find statutory preemption exists. As this legal conclusion is dispositive, there is no need for further proceedings in the case other than entry of judgment.

In the section on federal preemption, the Airline Deregulation Act of 1978 provides as follows:

> Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

49 U.S.C. App. § 1305(a)(1) (1988). The exception provided in subsection (2) is air transportation wholly within the state of Alaska. It has no application here.

[2] Federal Express is an air carrier having authority under subchapter IV, 49 U.S.C. § 1371, to provide air transportation. The PUC is seeking to impose regulations with the effect of law on its services. Q.E.D. — federal preemption is required by a federal statute that expressly preempts state regulation.

Our cases, however, have not read the statute quite so literally or without attention to the context of other law into which the

statute fits. Thus we have taken into account the presumption against preemption when Congress legislates in the fields of common law tort and contract. *See California v. ARC America Corp.*, 490 U.S. 93, 101 (1989); *West v. Northwest Airlines*, 923 F.2d 657, 659 (9th Cir. 1991). While preemption has been enforced against a claim based on a state statute regulating access to transportation, an accompanying tort claim for the intentional infliction of emotional harm was held to be unpreempted. *Hingson v. Pacific Southwest Airlines*, 743 F.2d 1408, 1415-16 (9th Cir. 1984).

In a closer case we have also recognized that a California regulation against the recording of telephone conversations without warning could be applied to an airlines' reservation system and was not preempted. *Air Transport Ass'n v. Public Util. Comm'n*, 833 F.2d 200, 207 (9th Cir. 1987), *cert. denied*, 487 U.S. 1236 (1988). Indeed, the district court relied on this decision in making its decision in the instant case. But we did inject the caution in *Air Transport*. "This is not, however, an appropriate case for the definitive resolution of the scope of federal preemption under the Deregulation Act." *Id.* The regulation in question was construed to relate to neither rates nor routes nor services of an air carrier. *Id.*

[3] *Air Transport* should be understood as allowing the state to act in an area of non-economic regulation — to impose a general rate for the protection of telephone users without carving out an exception for air carriers. In the same way it is uncontested in this case that the general traffic laws of California and its safety requirements for trucks on its highways apply to Federal Express; only economic regulation is challenged. In short, despite the very broad and apparently all-inclusive language of the statute, common sense and common practice have forbidden that the statute be taken literally and have restricted its range. Interpreted in terms of its purpose and in the context of other laws, the Airline Deregulation Act as it applies in this case

preempts action by the state that regulates the rates and terms of service offered by an air carrier.

[4] The trucking operations of Federal Express are integral to its operations as an air carrier. The trucking operations are not some separate business venture; they are part and parcel of the air delivery system. Every truck carries packages that are in interstate commerce by air. The use of the trucks depends on the conditions of air delivery. The timing of the trucks is meshed with the schedules of the planes. Federal Express owes some of its success to its effective use of trucking as part of its air carrier service.

[5] The PUC's regulation of rates, of discounts and promotional pricing, of claims, of overcharges, of bills of lading and freight bills, and its imposition of fees enters the zone that Congress has forbidden the states to enter. Its regulatory scheme does not restate common law principles of tort and contract. Its regulatory scheme goes far beyond safety on highways. Most of the regulations challenged here are obviously economic — they bear on price. Those regulations which are not patently economic — the rules on claims and bills of lading, for example — relate to the terms on which the air carrier offers its services. Terms of service determine cost. To regulate them is to affect the price. The terms of service are as much protected from state intrusion as are the air carrier's rates.

Our reading of the plain words of the statute is confirmed by consideration of the purposes of the Airline Deregulation Act and the Federal Aviation Act of 1958. The aim of federal preemption is to prohibit a state "from enacting any law, establishing any standard determining routes, schedules, or rates, fares, or charges in tariffs of, or otherwise promulgating economic regulations, for any air carrier certified by the Board." H. Cong. Rep. No. 1779, 95th Cong., 2d Sess. 94, *reprinted in* 1978 U. S. Code Cong. & Admin. News 3773, 3804. The Federal

Aviation Act of 1958 confided to federal authority the "promotion of adequate, economical, and efficient service by air carriers at reasonable charges," 49 U.S.C. § 1302(c). Amending the 1958 act in 1977, Congress specifically required "a sound regulatory environment" where decisions, "reached promptly," "facilitate adaptation of the air transportation system to the present and future needs of the domestic and foreign commerce of the United States," 49 U.S.C. App. § 1302(a)(5). In particular, in 1977, Congress sought the "encouragement and development of an expedited all-cargo air service system," 49 U.S.C. App. § 1302(b)(1), and Congress sought under the same heading, "Factors for all-cargo air service," the "encouragement and development of an integrated transportation system," 49 U.S.C. App. § 1302(b)(2).

[6] Federal Express is exactly the kind of an expedited all-cargo service that Congress specified and the kind of integrated transportation system that was federally desired. Because it is an integrated system, it is a hybrid, an air carrier employing trucks. Those trucks do not destroy its status as an air carrier. They are an essential part of the all-cargo air service that Federal Express innovatively developed to meet the demands of an increasingly interlinked nation. Congress has freed it from the constrictive grasp of economic regulation by the states.

REVERSED and REMANDED with instructions to enter judgment for the plaintiffs granting the injunctive relief requested.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 89-16444

DC# C-87-4891-MHP

FEDERAL EXPRESS CORPORATION,
Plaintiff-Appellant,

v.

CALIFORNIA PUBLIC UTILITIES COMMISSION; STANLEY W. HULETT; DONALD VIAL; FREDERICK R. DUDA; JOHN B. OHANIAN; G. MICHAEL WILK; VICTOR WEISER; NORMAN KELLEY,
Defendants-Appellees.

Filed: June 27, 1991

ORDER

Before: BEEZER and NOONAN, Circuit Judges, and SINGLETON*, District Judge

The attached dissent of Judge Singleton was inadvertently omitted from the majority opinion filed June 25, 1991, and should be attached thereto.

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* The Honorable James K. Singleton, United States District Judge for the District of Alaska, sitting by designation.

Federal Express Corporation v. Calif. P.U.C., No. 89-16444

SINGLETON, Jr., District Judge, dissenting.

Congress has preempted state regulation of certain activities of air carriers. The statute provides in part:

> [N]o state or political subdivision thereof [except Alaska] ... shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

49 U.S.C. App. § 1305(a)(1) (1988). In this case we are asked to apply this statute to the operations of Federal Express Corporation (Federal Express), a conceded air carrier. We must determine whether Congress intended to preempt state economic regulation of Federal Express's transportation of cargo exclusively by truck and exclusively within the borders of California. I am of the view that Congress did not intend to preempt state regulation of Federal Express's purely intrastate trucking business and therefore dissent from this court's decision.

This case turns on the meaning of certain phrases in the applicable statute. In order to determine the scope of the statute we must determine whether California's threatened economic regulations "relat[e] to rates, routes, or services of any air carrier [authorized by federal law] to provide air transportation." Clearly Congress intended to exempt activities pertaining to setting rates, determining routes, and providing services of an air carrier necessary to provide air transportation.[1] It would appear equally

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[1] Congress defines an "air carrier" as a citizen of the United States engaging in "air transportation." 49 U.S.C. App. § 1301(3) (1988). Congress defines "air transportation" in part as "interstate" transportation by aircraft. 49 U.S.C.

(Footnote 1 continued on next page)

clear that Congress did not intend to exempt activities of an air carrier that were not related to the provision of air transportation.[2]

In determining which activities are exempt and which are not, it is useful to consider an analogy to the insect kingdom. All caterpillars have the potential of becoming butterflies and flying above the earth. However, many caterpillars succumb before metamorphosis and live their entire lives earthbound. If we analogize packages to insects, this case is about caterpillars and not butterflies.[3]

(Footnote 1 Continued)

App. § 1301(10). "Interstate air commerce" means "the carriage by aircraft of . . . property for compensation . . . whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation." 49 U.S.C. App. § 1301(23).

California apparently does not contend that these definitions restrict the exemption in section 1305 to state regulation of interstate transportation of goods by aircraft, nor does it contend that the statute permits state regulation of intrastate carriage of goods by air. It does argue, however, that be defining "air transportation" to include goods carried in part by aircraft and in part by trucks, Congress did intend to permit state regulation of goods carried exclusively by truck.

[2] For purposes of analysis it is useful to refer to those activities which Congress chose not to regulate and which it preempted the states from regulating as exempt activities. Those activities which the states are free to regulate will be called nonexempt activities.

[3] Parcels which are carried at some point in an airplane for brevity will be called air packages. Those parcels that never see the inside of an airplane will be called land packages. By analogy air packages would be butterflies and land packages caterpillars. It might be more apt to call them dead caterpillars because if they reach their destination without ever entering an airplane they never will become butterflies.

California's concessions make this an easy case. The state recognizes that in order to transport goods by air it is necessary to get them from a collection point to an airplane and that state economic regulation of incidental truck traffic is preempted. The state also implicitly concedes that if Federal Express picks up a package in Memphis, flies it to Oakland, and transports it by truck to Los Angeles, the entire trip, including the ground leg, is preempted from state regulation. Thus California makes no claim to regulate commerce carried wholly or partly by airplane. *See* 49 U.S.C. App. § 1301(10) and (24) (1988).

California seeks to regulate the carriage of only those packages that never see the interior of an airplane. I see nothing in the cited statute that preempts California from doing so. It seems clear to me that transporting packages solely by truck within California is not a service of an air carrier authorized to provide air transportation.

The majority never explains how the carriage of goods by land is somehow transformed into the carriage of goods by air.[4]

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[4] The majority never expressly discloses its reasoning. The majority opinion describes Federal Express's air transportation activities. It argues a point that California concedes, that Congress would frown on attempts to regulate air transportation. It finesses the question presented here whether transportation of land packages is exempt from regulation. It distinguishes certain cases. It pursues another point conceded by California, that transportation of air packages in Federal Express trucks is exempt and it concludes with a paean to deregulation of air carriers. Implicit in the opinion is the assumption that Federal Express has so integrated its business by including both air packages and land packages in each truck, that California's attempts to regulate the latter necessarily regulates the former. If this is the rationale, then the holding would be that anytime an industry intermixes exempt and nonexempt activities neither can be regulated by the state. If the United States Supreme Court or this court had ever previously so held, those decisions should be cited rendering the majority's opinion unassailable. The majority cites no cases for this proposition, however. Rather, it seeks to distinguish

(Footnote 4 continued next page)

Federal Express has a number of arguments. It contends the statute exempts any service performed by an air carrier, and concludes that it is primarily an air carrier and so any transportation activity it conducts automatically becomes exempt.[5] Thus, if Federal Express diversifies into the florist or pizza business in San Francisco and uses its fleet of trucks to deliver flowers or pizza in the Bay Area, presumably the selling of flowers or pizza become activities preempted from state regulation whether airplanes play any part in the delivery or not. I cannot accept this argument and I do not believe the majority intends its decision to extend this far.[6]

(Footnote 4 Continued)

prior decisions of this court which held that state regulation of activities which were clearly "services of an air carrier" were not preempted. Even if we accept the distinction the majority draws between "economic" and "non-economic" regulation, a troublesome distinction in context, the distinction does not advance the majority's decision. The fact that regulation of some "air services" is not preempted does not support a holding that services that have no connection with "air transportation" are preempted.

[5] Federal Express errs in my view by focusing on the term "services" in the statute and ignoring the context "of an air carrier authorized to provide air transportation." In context, it is clear that only "air services", by which I mean services constituting air transportation, are exempt.

[6] The majority might respond to the "pizza" example by echoing Justice Holmes famous riposte "not . . . while this court sits." *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218, 223, 48 S. Ct. 451, 453 (1928) (Holmes, J., dissenting). While unwilling to formulate a principle that would distinguish "air services" from other potential services of an air carrier, the majority might recognize a point at which ground services were so divorced from air services that economic regulation of the former would not impede performance of the latter. Compare Justice Stewart's test for obscenity "I know it

(Footnote 6 continued on next page)

Federal Express's primary argument is that its business is so integrated that it would be inconvenient to segregate land packages from air packages. In fact Federal Express maintains that no one ever knows until the last minute whether a given package will be flown or driven to its intrastate destination. To accept this argument is to confuse Federal Express's other commerce clause arguments with its preemption arguments. Federal Express's unilateral decision to mix its intrastate carriage of goods by truck with the carriage of other packages taken from airplanes cannot transform purely ground transportation into air transportation.

The majority may be influenced by the fact that only a small percentage of the packages currently carried by Federal Express trucks really qualify as caterpillars. On this record, the overwhelming majority appear to be butterflies. We must recognize, however, that nothing is static in the highly competitive transportation industry. The majority's decision will free the trucking business of Federal Express from any state economic regulation. This will open the door for substantial increases in Federal Express's trucking business and give it a substantial competitive advantage over trucking companies that must comply with state regulation. The majority really does not set out a rationale for determining when an air carrier's ground transportation loses its quality as air transportation. The majority decision could be read as exempting any transportation services Federal Express wishes to provide. The majority does not tell us how many airplanes Federal Express must fly to Sacramento each month, in order to insulate daily truck traffic between Oakland and Sacramento

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(Footnote 6 Continued)

when I see it." *Jacobellis v. Ohio*, 378 U.S. 184, 197, 84 S. Ct. 1676, 1683 (1964) (Stewart, J., concurring).

This approach is flawed in my view because it does not guide the trial bench and the bar in deciding other cases. My proposed resolution has the advantage of providing a bright line rule.

from state regulation. Will one Cessna 208 carrying three packages between Oakland and Sacramento authorize Federal Express to send a dozen trucks packed with goods between the two cities free of state regulation? The majority does not address packages deposited on the San Francisco peninsula for delivery in the East Bay that never see an airplane. In my view, we should apply the plain language of the statute.[7] Federal Express's air transportation services, including land transportation incidental thereto, are exempt from state regulation while its exclusively intrastate land transportation services are not exempt from state regulation. If the two overlap, we are presented with general commerce clause concerns not preemption concerns.

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[7] Miners search for gold in creek beds and frequently are mislead by pyrites. Judges search for plain meanings in statutes and are frequently mislead by a mirage. A claim that any statute has a "plain meaning" is at the very best an overstatement. More often it begs the question to be answered. My view of the statute at least finds support in its context and if we look beyond immediate context my reading of the statute finds support in Congresses purpose as disclosed in the language used in the statutes governing air carriers as a whole.